121 — 264

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 188.

FRANCIS E. HINCKLEY, PLAINTIFF IN ERROR,

vs.

THE PITTSBURGH BESSEMER STEEL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 22, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 188.

FRANCIS E. HINCKLEY, PLAINTIFF IN ERROR,

vs.

THE PITTSBURGH BESSEMER STEEL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Præcipe for summons	2	1
Bond for costs	2	1
Summons	3	1
Marshal's return	4	2
Declaration	6	3
Account sued on	17	7
Appearance for defendant	18	8
Order for default	19	8
Order setting aside default	20	8
Plea	21	9
Order postponing argument	22	9
Opinion	23	9
Judgment	34	13
Bill of exceptions	35	14
Memorandum of sale	36	14
Letters and telegrams	39	15
Testimony of James S. Norton	55	20
C. H. Odell	55	21
H. P. Smith	57	21
L. S. Boomer	66	26
R. R. Jones	66	26

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Testimony of Lewis T. Moore	67	26
H. C. Draper	67	26
F. E. Hinckley	67	26
Thos. Jordan	68	27
H. P. Smith (recalled)	69	27
H. Duval	69	27
F. K. Boos	69	27
F. E. Hinckley (recalled)	70	28
Richard C. Hannah	70	28
Findings of facts	72	28
Statement of facts upon which bill of exceptions is certified	78	31
Exhibit A—Affidavit of W. C. Goudy	81	32
Bond	84	33
Clerk's certificate	86	34
Writ of error	87	34
Citation	88	35
Proof of service of citation	89	35

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Saturday, the twenty-eighth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred and eighth year.

WM. H. BRADLEY, *Clerk.*

THE PITTSBURGH BESSEMER STEEL COMPANY, Limited,
vs.
FRANCIS E. HINCKLEY. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the nineteenth day of September, A. D. 1882, came the plaintiff, by its attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its *præcipe* for a writ of summons and bond for costs in said entitled cause, which said *præcipe* and bond are respectively in the words and figures following, to wit:

2 *Præcipe.*

United States Circuit Court, Northern District of Illinois.

THE PITTSBURGH BESSEMER STEEL COMPANY, Limited,
a Citizen of the State of Pennsylvania,
vs.
FRANCIS E. HINCKLEY. } Assumpsit. $100,000.00.

The clerk will please issue a summons in the above-entitled cause in an action of assumpsit to the damage of the plaintiff of one hundred thousand dollars, returnable to the October term of said court.

JEWETT, NORTON & LARNED,
Att'ys for Plaintiff.

Endorsed: Filed Sept. 19, 1882. Wm. H. Bradley, clerk.

Bond for Costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court. October Term, A. D. 1882.

THE PITTSBURGH BESSEMER STEEL COMPANY, Limited,
vs.
FRANCIS E. HINCKLEY. } In Assumpsit.

3 We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite

party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it we hereby agree and stipulate that execution may issue against our property for any costs taxed against it.

Dated this eighteenth day of September, A. D. 1882.

JEWETT, NORTON & LARNED.

Endorsed: Filed Sept. 19th, A. D. 1882. Wm. H. Bradley, clerk.

On the same day, to wit, on the nineteenth day of September, A. D. 1882, there issued out of said clerk's office a writ of summons in said entitled cause, which said writ, together with the return of the marshal thereto attached, is in the words and figures following, to wit:

Summons.

Circuit Court of the United States of America, Northern District of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon Francis E. Hinckley, if found in your district, to be and appear before our judges of our circuit
4 court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto The Pittsburgh Bessemer Steel Company, Limited, of a plea of trespass on the case, upon promises, to its damage, as it alleges, of one hundred thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 19th day of September, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 107th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Special Deputy's Return.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Know all men by these presents that I have appointed and by these presents do appoint Geo. N. Jones my true and lawful deputy to execute the annexed writ — The Pittsburgh Bessemer Steel Company, Limited, *vs.* Francis E. Hinckley, and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit:

By reading the same to and in the presence and the hearing of
5 Francis E. Hinckley, therein named, on the 19th day of September, A. D. 1882.

A. M. JONES,
United States Marshal.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

Geo. N. Jones, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 28 day of September, A. D. 1882.

[SEAL.] SAMUEL C. HAYES,
Notary Public.

Endorsed: Filed Oct. 2, A. D. 1882. W. H. Bradley, clerk.

Afterwards, to wit, on the twenty-second day of September, A. D. 1882, came the plaintiff, by its attorneys, and filed in said clerk's office its declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

6 *Declaration.*

UNITED STATES OF AMERICA, *State of Illinois,* } ss:

In the United States Circuit Court for the Northern District of Illinois.

The Pittsburgh Bessemer Steel Company, Limited, a corporation under the laws of and doing business in the State of Pennsylvania, and a citizen of the State of Pennsylvania, plaintiff, by Jewett, Norton & Larned, its attorneys, complains of Francis E. Hinckley, defendant, who is a citizen and resident of the State of Illinois, of a plea of trespass on the case on promises.

For that whereas the said plaintiff heretofore, to wit, on the eighteenth day of February, A. D. 1882, at Chicago, in the district aforesaid, made and entered into a certain memorandum or contract in writing with said defendant (which contract was in duplicate and one part thereof signed by this plaintiff and delivered to said defendant and the counterpart signed by said defendant and delivered to this plaintiff), wherein and whereby it was in substance
7 agreed by and between plaintiff and defendant that said plaintiff had sold and would make and deliver to the order of said defendant, and that said defendant had purchased, and would pay for, six thousand gross tons of first quality steel rails, to weigh fifty-two (52) pounds to the yard and to be rolled true and smooth to the pattern, to be furnished by the said plaintiff—pattern No. 5—and to be made of the best quality of Bessemer steel, and to be subject to inspection as made and shipped, and to be well straightened and free from flaws and drilled as might be directed, at least ninety per cent. to be in thirty (30) feet lengths and not over ten (10)

per cent. of shorter lengths, diminishing by one foot differences, none to be less than twenty-four (24) feet.

And it was thereby further agreed that all second-quality rails or excess of shorts which might be made, not exceeding five (5) per cent. of each month's shipments, should be taken at the usual reduction of ten (10) per cent. in price, and to be piled and shipped separately (painted white on both ends) as might be ordered by the inspector, and that deliveries should begin in May, 1882, in which month one thousand tons should be delivered, and should
8 continue at the rate of twenty-five hundred tons per month after July 1st, 1882, until finished, strikes and accidents beyond ordinary control of said plaintiff and acts of Providence preventing or suspending deliveries alone excepted, in which case deliveries were to be delayed for a corresponding length of time only.

And it was thereby further agreed that the price for said rails should be fifty-eight dollars net per ton of 2,240 pounds of finished steel rails, out of ship or free on board cars at Chicago, Illinois, seller's option, to be paid in cash on delivery of inspector's certificate for each five hundred tons as fast as delivered, and that if shipment should be delayed without fault of the said plaintiff payment should be made in cash upon completion and delivery of each five hundred tons at Chicago and inspector's certificate, and that said rails should be inspected at mill as fast as completed and ready for shipment.

And it was thereby further agreed that the plaintiff should not be responsible for delays resulting from failure of railroads to
9 furnish cars, proper efforts having been made to procure them, nor for detentions after shipment had been made; and, further, that the defendant should have the right to make one-half of the order fifty-six (56) pounds per yard, plaintiff's pattern No. 4, notice to be given thirty days before the time of the delivery of the rails.

And, although plaintiff has been at all times since the making of said sale and contract ready and willing to furnish and deliver to defendant the rails aforesaid according to said contract, and in all things to carry out and perform said contract on its part, and has applied to said defendant for directions for drilling said rails and for shipping the same, yet said defendant has not given said directions, but has by his acts delayed and prevented the delivery of said rails according to the terms of said contract, and has refused to take and pay for said rails, or any part thereof, according to the terms of said contract, although the time for said delivery of said rails and payment therefor has long since elapsed.

Whereby the plaintiff has suffered great loss and damage
10 in expenses incurred by it under and by reason of said contract, and has been deprived of divers great gains and profits which would otherwise have accrued to it from the delivery of said rails and payment therefor as aforesaid, to the damage of said plaintiff of one hundred thousand dollars; which sum the defendant at

the time and place aforesaid promised to pay to the plaintiff when thereafter requested.

And whereas also the said plaintiff heretofore, to wit, on the eighteenth day of February, 1882, at Chicago, in the district aforesaid, made and entered into a certain memorandum or contract in writing with said defendant, which contract was in duplicate and one part thereof signed by this plaintiff and delivered to said defendant and the counterpart signed by the said defendant and delivered to this plaintiff, which contract was in the words and figures following:

11 *Memorandum of Sale.*

The Pittsburgh Bessemer Steel Company, Limited, have sold and hereby agree to make and deliver to the order of F. E. Hinckley, Esq., 204 Dearborn St., Chicago, Ills., and the said Hinckley has purchased and agrees to pay for six thousand gross tons of first-quality steel rails to weigh fifty-two (52) pounds to the yard, and to be rolled true and smooth to the pattern to be furnished by the said Pittsburgh Bessemer Steel Company, Limited, pattern No. 5.

Said rails are to be made of the best quality of Bessemer steel, and to be subject to inspection as made and shipped, and to be well straightened and free from flaws, and to be drilled as may be directed; at least ninety per cent. shall be in thirty (30) feet lengths with not over ten (10) per cent. of shorter lengths, diminishing by one foot differences, none to be less than twenty-four (24) feet.

All second-quality rails or excess of shorts which may be made not exceeding five (5) per cent. of each month's shipments to be taken at the usual reduction of ten (10) per cent. in price, and to
12 be piled and shipped separately (painted white on both ends) as may be ordered by the inspector.

Deliveries to begin in May, 1882, in which month one thousand tons shall be delivered, and to continue at the rate of twenty-five hundred tons per month after July 1st, 1882, until finished, strikes and accidents beyond ordinary control of said steel company and acts of Providence preventing or suspending deliveries alone excepted, in which case deliveries are to be delayed for a corresponding length of time only.

Price to be fifty-eight dollars net per ton of 2,240 pounds of finished steel rails, ex. ship or f. o. b. cars at Chicago, Ills., seller's option.

Terms of payment, cash on delivery of inspector's certificate for each five hundred tons as fast as delivered. If shipment is delayed without fault of said steel company, payment is to be made in cash upon completion and delivery of each five hundred tons at Chicago and inspector's certificate. Rails to be inspected at mill as fast as completed and ready for shipment.

In witness whereof the said Hinckley has hereto set his
13 hand and seal and the Pittsburgh Bessemer Steel Company, Limited, by its duly authorized officers, hath signed and affixed its corporate seal the day and year aforesaid.

It is further agreed that the Pittsburgh Bessemer Steel Company

(Limited) are not to be responsible for delays resulting from failure of railroads to furnish cars, proper efforts having been made to procure them, nor for detentions after shipment has been made.

It is understood that the purchaser shall have the right to make one-half of the order fifty-six (56) pounds per yard, pattern No. 4 of said steel company, notice to be given thirty days before the time for the delivery of the rails.

Chicago, Ills., Feb. 18th, 1882.

(Signed) F. E. HINCKLEY.

C. H. ODELL, *Broker.*

14 And although the plaintiff has been at all times since the making of the said sale and contract ready and willing to furnish and deliver to defendant the rails aforesaid, according to the terms of said contract, and in all things to carry out and perform said contract on its part, and has applied to said defendant for directions for drilling said rails and for shipping the same, yet said defendant has not given said directions, and has neglected and refused to give said directions for drilling said rails, whereby said plaintiff has been prevented from completing the manufacture thereof within the time limited by said contract, and said defendant has neglected and refused to give instructions for shipping the same, and has declared that he was not ready to receive the same within the time specified in said contract for the delivery thereof, and has requested the plaintiff from time to time to defer the delivery of the said rails, and has finally, when the plaintiff has offered to complete and deliver said rails, informed the plaintiff that he was not willing to receive and pay for the same or any part thereof, and would
15 not accept said rails and pay for the same according to said contract, and utterly refused to carry out and perform said contract on his part, although the time for the delivery of the said rails and payment thereof had already long since elapsed, whereby the plaintiff was prevented from delivering or tendering said rails to the defendant according to the provisions of said contract, whereby the plaintiff has suffered great loss and damage in expenses incurred by it under and by reason of said contract, and has been deprived of divers great gains and profits which would otherwise have accrued to it from the delivery of said rails and payment therefor as aforesaid, to the damage of said plaintiff of one hundred thousand dollars, which sum the defendant, at the time and place aforesaid, promised to pay to the plaintiff when thereafter requested.

And whereas, also, the said defendant afterwards, to wit, on the sixteenth day of September, in the year of our Lord one thousand eight hundred and eighty-two, in said district, became and was indebted to the said plaintiff in the further sum of one hundred
16 thousand dollars of lawful money of the United States of America for money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant; and in the like sum for other money by the said plaintiff before that time paid, laid out, and ex-

pended for the said defendant and at the like special instance and request of the said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff; and in the like sum for goods, wares, and merchandise before that time sold and delivered by the said plaintiff to the said defendant at the like special instance and request of the said defendant; and in the like sum for the price and value of work done and material for the same provided by the said
17 plaintiff for the said defendant, and at the like special request of the said defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on day and year aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested. Nevertheless, the said defendant, although often requested, has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but has hitherto neglected and refused, and still does neglect and refuse, so to do, to the damage of the said plaintiff of one hundred thousand dollars; and therefore the said plaintiff brings suit, etc.

JEWETT, NORTON & LARNED,
Pl'f's Att'ys.

Copy of Account Sued On.

Francis E. Hinckley to The Pittsburgh Bessemer Steel Company, Limited.

18 To goods, wares, and merchandise sold and delivered	$100,000
To money lent and advanced	100,000
To money paid, laid out, and expended	100,000
To money had and received to and for the use of plaintiff	100,000
To money due for interest and forbearance	100,000
To labor, services, and material	100,000

(Copy of contract sued on is contained in second count of foregoing declaration.)

(Endorsed:) Filed Sept. 22, 1882. Wm. H. Bradley, clerk.

Afterwards, to wit, on the ninth day of October, A. D. 1882, came the defendant, by his attorney, and filed in said clerk's office his appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance.

United States Circuit Court, Northern District of Illinois.

19 PITTSBURGH BESSEMER STEEL COMPANY, Limited,
vs.
FRANCIS E. HINCKLEY.

Wm. H. Bradley, Esq., clerk of said court:

Please enter my appearance as attorney for the defendant in the above-entitled suit.

GEO. W. COTHRAN,
Att'y for Defendant.

Endorsed: Filed Oct. 9, 1882. W. H. Bradley, cl'k.

Afterwards, to wit, on the eleventh day of October, in the adjourned October term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE PITTSBURGH BESSEMER STEEL COMPANY, Limited, } Assumpsit.
vs.
FRANCIS E. HINCKLEY. }

Now comes the plaintiff, by W. C. Larned, Esq., its attorney, and moves the court for default against the defendant, and it ap-
20 pearing to the court that the defendant had been duly served with process and has failed to plead, and he being now ruled to plead *instanter*, and he failing to plead or answer the rule, and the defendant being now three times solemnly called comes not, but makes default, it is thereupon considered by the court that his default be entered.

Afterwards, to wit, on the sixteenth day of October, in the adjourned October term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE PITTSBURGH BESSEMER STEEL COMPANY, Limited, } Assumpsit.
vs.
FRANCIS E. HINCKLEY. }

On motion of the defendant, by George W. Cothran, Esq., his attorney, it is ordered that the default entered herein be set aside and vacated, and the defendant have leave to plead *instanter*.

On the same day, to wit, on the sixteenth day of October, A. D. 1882, came the defendant, by his attorney, and filed in said clerk's office his plea in said entitled cause, which said plea is in
21 the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA, } ss:
State of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

FRANCIS E. HINCKLEY, D'f't, }
ats. } Ass't.
THE PITTSBURGH BESSEMER STEEL COMPANY, Limited, Pl'ff, }

And the defendant, by George W. Cothran, his attorney, comes and defends the wrong and injury when, etc., and says that he did not undertake or promise in manner and form as the plaintiff has above thereof complained against him, and of this he puts himself upon the country, etc.

GEO. W. COTHRAN,
Def't's Att'y.

Endorsed: Filed Oct. 16, 1882. Wm. H. Bradley, clerk.

22 Afterwards, to wit, on the nineteenth day of May, in the adjourned May term of said court, A. D. 1883, in the record of the proceedings thereof in the said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE PITTSBURGH BESSEMER STEEL COMPANY, Limited, }
vs. } Assumpsit.
FRANCIS E. HINCKLEY. }

Now come the parties, by their attorneys, and upon issue joined, by agreement of the parties, by their attorneys, they waive the intervention of a jury and for trial put themselves upon the court, and, after hearing the evidence, by agreement it is ordered that the arguments of counsel be postponed to a future day.

Afterwards, to wit, on the twenty-eighth day of July, A. D. 1883, Judge Blodgett filed in said clerk's office his opinion in said entitled cause, which said opinion is in the words and figures following, to wit:

23 *Opinion of Judge Blodgett.*

BLODGETT, *J:*

This is an action to recover damages for the alleged breach by defendant of a contract made between himself and the plaintiff on the eighteenth day of February, 1882, whereby plaintiff sold to defendant 6,000 gross tons of first-quality steel rails, to weigh 52 pounds to the yard, for which defendant agreed to pay plaintiff at the rate of $58 per ton of 2,240 pounds, delivered free on board cars at Chicago, Illinois, 1,000 tons of which rails were to be deliv-

cred in May, 1880, and the balance delivered at the rate of 2,500 tons per month after July 1, 1882. By the terms of the contract the rails were to be drilled as directed by the defendant.

It appears from the proof in the case that the plaintiff notified the defendant in the forepart of the month of April that it would be ready to commence rolling the week ending May 5th the 1,000 tons of rails which were to be delivered in May, and requested him to forward directions at once. This the defendant neglected to do, but requested the plaintiff to delay rolling the rails for the May delivery. Plaintiff did so delay to roll and deliver any rails
24 in May, but, during the month of May, again urged the defendant to furnish drilling directions, in order that it might commence the performance of its contract; and, from time to time, during the months of May, June, and July, defendant was repeatedly requested to furnish drilling directions, and repeatedly requested to take said rails, but declined to do so, and, finally, in the latter part of the month of July, defendant absolutely refused to give drilling directions for the manufacture of said rails, and notified the plaintiffs that he could not and would not accept and pay for them. The proof also shows that immediately after [the] making of the contract between the plaintiff and defendant the plaintiff purchased the material out of which to manufacture the rails called for by the contract, and was, at all times up to the time of the absolute refusal of the defendant to accept said rails, ready and able to manufacture said rails and deliver the same according to the terms of the contract.

The contract, taken in connection with the parol testimony in the case, satisfies me that the drilling directions—that is, the directions where and how to drill the holes near the ends of the
25 rail by which the fish-plates or splice-bars are bolted to the rails—was an important item in the manufacture of the rails, and that if the plaintiff had made the rails and drilled them without the directions of the defendant he could legally have refused to accept them on that ground, as it appears from the proof that drilling is now considered a part of the manufacture of the rails; that a steel rail is usually drilled by the manufacturer, and that the purchaser gives directions as to how it shall be done.

Read, therefore, in the light of the parol proof offered by the defendant at the trial, I think the giving of drilling directions by the defendant was a condition precedent to be performed by the defendant before plaintiff could proceed with the proper execution of its contract, and that the neglect and final refusal of the defendant to give drilling directions was, of itself, a breach of the contract on the part of the defendant which excused the plaintiff from the actual manufacture of the rails and the actual tender of them to the defendant.

I think the testimony in the case fully justifies the conclusion that defendant's neglect and refusal to furnish drilling directions
26 was for the mere purpose of delay, and that from early in the month of May defendant did not intend to fulfill this contract. Not only had there been a large decline in the price of steel

rails upon the market, but the defendant had failed to make satisfactory financial arrangements to enable him to pay for the rails. For a time, therefore, he asked and obtained from the plaintiff a delay and postponement of the time of delivery; but finally, when pressed by plaintiff to give the directions for drilling and to take the rails, he frankly told the agents of plaintiff that he could not pay for the rails and would not receive them. This statement by defendant that he would not perform the contract by accepting and paying for the rails was also a breach of the contract by defendant, and entitled plaintiff to damages.

The only question in the case, therefore, as it seems to me, is what damage the plaintiff has sustained by reason of defendant's breach of this contract.

The rule in awarding damages in cases of this character for a breach of contract is to make the plaintiff as nearly whole as
27 he can be made in money damages; or, in other words, as nearly as possible leave him as well off as he would have been if the defendant had performed his contract. Here was a manufacturing corporation, with expensive machinery and plant, and compelled, from the nature of its business, to invest large sums of money in iron ore, pig-iron, spiegel, coke, and other material, and in labor for the purpose of performing this contract. The proof shows that the plaintiff, on making this contract in good faith, purchased the material necessary to fulfill it. The proof as to the cost of these rails to plaintiff rests on the testimony of two witnesses—H. P. Smith, the manager of plaintiff's mill, and Richard C. Hanna, secretary of the North Chicago Rolling Mill Company.

Mr. Smith states that the cost of manufacturing the rails in question at plaintiff's mill in Pittsburgh was $45.12 per ton, and that the freight on them to Chicago, where they were to be delivered to plaintiff, was three dollars per ton, making a total cost of manufacturing and delivering the rails to defendant, under the terms of this contract, $48.12 per ton; while Mr. Hanna states that it cost his company $50 per ton to make such rails in Chicago, and that from information he had derived from his experience in the
28 business plaintiff could make the steel rails called for by this contract in its mill at Pittsburgh, and deliver them in Chicago, at just about what it cost the North Chicago Rolling Mills Company to make them here. Mr. Hanna has no interest in the event of this suit, is not connected with either party, and I conclude that his testimony as to the cost of these rails here is the most reliable, and that it would, in fact, have cost the plaintiff $50 per ton to have made these rails and delivered them to the defendant in accordance with the terms of this contract. The proof also shows that steel rails declined rapidly from about the time this contract was made, so that during the months of August and September they were not worth as much by from $10 to $12 per ton as the contract called for. The proof, however, further shows that after the plaintiff was informed that defendant would not take and pay for the rails at the time called for by his contract the plaintiff sold to a railroad company in Michigan 4,000 tons of steel rails which

were manufactured out of the material provided for the fulfillment of this contract with the defendant, for which plaintiff
29 received $54.60 per ton, delivered at a point on Lake Huron. These were 35-pound rails, and it cost the plaintiff $49 per ton, as the proof shows, to manufacture them, and $4 per ton to transport them, leaving a profit of $1.60 per ton to plaintiff, and this profit should be deducted from the difference between the contract price with the defendant and the cost of making the rails under the defendant's contract—that is to say, the difference between the cost of the rails in Chicago to the plaintiff and the contract price is eight dollars per ton, which on the 6,000 would amount to $48,000. From this should be deducted the profit of $1.60 per ton on the 4,000 tons of rails sold in Michigan, amounting to $6,400, leaving $42,400 as the loss to which plaintiff has been subjected by this breach of defendant's contract, and, it seems to me, in the light of well-settled authorities *authorities* that this should be and is the true measure of plaintiff's damages.

In the case of the Philadelphia, W. & B. R. Co. *v.* Howard, 13 How., 307, where the opinion was delivered by Mr. Justice Curtis, it is said:

"But it by no means follows that profits are not to be al-
30 lowed, understanding as we must the term "profits" in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustained, *propter rem ipsam non habitare.* In case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into his contract. For that he spends his time, exerts his skill, uses his capital, and assumes the risk- which attend the enterprise, and to deprive him of it when the other party has broken the contract, and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Whenever profits are spoken of as not a subject-matter of damages it will be found that something contingent upon future bargains or speculations or states of the markets are referred to and not the difference between the agreed price of something contracted for and its ascertainable value or cost. We hold it to be a clear rule that the gains or profit of which the contractor
31 was deprived by the refusal of the company to allow him to proceed with and complete his work was a proper subject of damages."

And the same rule is announced in the late work of Sutherland, Dam., vol. 1, p. 117, where it is said:

"Where a party has attempted to perform labor from which a profit is to spring as a direct result of the work done at the contract price, and he is prevented from earning this profit by the refusal to act of another party, the loss of this profit is the direct and natural result which the law will assume to be the breach of the contract, and he is entitled to recover it, with proper damages, and this

he will be entitled to establish by showing how much less than the contract price it will cost to do the work or perform the contract."

And the conclusion just stated by Mr. Sutherland is supported by the citation of numerous recent cases; and in Masterton *v.* Mayor, etc., of the City of Brooklyn, 7 Hill, 61, the same rule was adopted. So, too, in U. S. *v.* Speed, 8 Wall., 77, the Court said, by Mr. Justice Miller:

"And we do not believe that any safer rule, or one nearer to that supported by the general current of authority, can be found
32 than that adopted by the court, to wit, the difference between the cost of doing the work and what the claimant was to receive for it, making reasonable deduction for the loss of time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."

The proof in this case abundantly shows that the plaintiff could not have manufactured its material into rails and sold those rails upon the market without sustaining a greater loss than the difference between the price called for by this contract and the cost of making the rails; in other words, if the plaintiff had manufactured the rails in pursuance of this contract, and, on defendant's refusal to receive them, had put them upon the market and sold them at the current market price, the loss to the plaintiff would have been greater than the amount of damages I have arrived at by the rule adopted.

There is, therefore, no allowance or deduction to be made in this case for a "release from the care, trouble, risk, and responsibility attending a full execution of the contract," because the plaintiff was obliged to go upon the general market to find a new cus-
33 tomer for its goods, and sell them at a lower price than the difference between the cost of manufacturing and the contract price, instead of receiving the profit which the contract with the defendant entitled it to. The risk, care, and trouble, therefore, devolved upon plaintiff by reason of the breach of the contract rather than any which would have followed its performance.

I must, therefore, find the issues for the plaintiff, and assess the damages at $42,400.

Endorsed: Filed July 28, 1883. Wm. H. Bradley, clerk.

On the same day, to wit, on the twenty-eighth day of July, in the July term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

34 *Judgment.*

THE PITTSBURGH BESSEMER STEEL COMPANY, Limited, *vs.* FRANCIS E. HINCKLEY. } Assumpsit.

Now, on this day, come the parties, by their attorneys, and the court, having considered and being now fully advised, finds the

issues for the plaintiff, and assesses its damages at the sum of forty-two thousand four hundred dollars.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant said sum of forty-two thousand four hundred dollars, its damages so as aforesaid assessed, together with its costs and charges in this behalf expended, taxed at the sum of twenty-eight dollars and twenty cents, and that execution issue therefor.

35 In the United States Circuit Court for the Northern District of Illinois. March Term, A. D. 1883.

THE PITTSBURGH BESSEMER STEEL COMPANY (Limited)
v.
FRANCIS E. HINCKLEY.

Be it remembered that this case coming on for trial, and a jury being waived and the issued submitted to the court, the plaintiff read in evidence the following contract:

36 *Memorandum of Sale.*

The Pittsburgh Bessemer Steel Company, Limited, have sold and hereby agree to make and deliver to the order of F. E. Hinckley, Esq., 204 Dearborn St., Chicago, Ills., and the said Hinckley has purchased and agrees to pay for six thousand gross tons of first-quality steel rails, to weigh fifty-two (52) pounds to the yard, and to be rolled true and smooth to the pattern to be furnished by the said Pittsburgh Bessemer Steel Company, L't'd, pattern No. 5.

Said rails to be made of the best quality of Bessemer steel, and to be subject to inspection as made and shipped, and to be well straightened and free from flaws, and to be drilled as may be directed. At *at* least ninety per cent. shall be in thirty (30) feet lengths, with not over ten (10) per cent. of shorter lengths, diminishing by one-foot dif-erences, none to be less than twenty-four (24) feet.

37 All second-quality rails or excess of shorts which may be made, not exceeding five (5) per cent. of each month's shipments, to be taken at the usual reduction of ten (10) per cent. in price, and to be piled and shipped separately (painted white on both ends) as may be ordered by the inspector.

Deliveries to begin in May, 1882, in which month one thousand tons shall be delivered, and to continue at the rate of twenty-five hundred tons per month after July 1st, 1882, until finished, strikes and accidents beyond ordinary control of said steel company and acts of Providence preventing or suspending deliveries alone excepted, in which deliveries are to be delayed for a corresponding length of time only.

Price to be fifty-eight dollars net per ton of 2,240 pounds of finished steel rails, ex. ship. or f. o. b. cars at *at* Chicago, Ills., seller's option.

Terms of payment: Cash on delivery of inspector's certificate for each five hundred tons as fast as delivered. If shipment is delayed

without fault of the said steel company payment is to be made in cash upon completion and delivery of each five hundred tons
38 at Chicago and — inspector's certificate; rails to be inspected at mill as fast as completed and ready for shipment.

In witness whereof the said Hinckley has hereto set his hand and seal, and The Pittsburgh Bessemer Steel Company, Limited, by its duly authorized officers, hath signed and affixed its corporate seal the day and year aforesaid.

It is further agreed that The Pittsburgh Bessemer Steel Company (Limited) are not to be responsible for delays resulting from failure of railroads to furnish cars, proper efforts having been made to procure them, nor for detentions after shipment has been made.

It is understood that the purchaser shall have the right to make one-half of the order fifty-six (56) pounds per yard, pattern No. 4 of said steel company, notice to be given thirty days before the time for the delivery of the rails.

Chicago, Ills., Feb'y 18, '82.

F. E. HINCKLEY.

C. H. ODELL, *Broker.*

A duplicate copy of the above agreement signed by The Pittsburgh Bessemer Steel Company, Limited, was also read in evidence.

39 The plaintiff then read in evidence the following letters and telegrams:

Letter written by Odell Mar. 29th, 1882, to defendant.
" from defendant to Odell, April 1st, 1882.
" " Odell to defendant, " 3rd, 1882.
" " " " " 20th, 1882.
Telegram from Odell to defendant, April 20th, 1882.
Letter to Odell from " April 24th, "
" from Odell to " " " "
" " " to " " 26th, "
" " " " " 28th, "
" to " from " May 1st, "
Telegram from plaintiff to defendant, May 13th, 1882.
" " defendant to plaintiff, " 13th, "
Letter from plaintiff to defendant, June 12th, "
" " defendant to plaintiff, " 15th, "
" " plaintiff to defendant, " 23rd, "
Telegram from defendant to plaintiff, July 26th, "
" " plaintiff to defendant, " " "

Letter *to* plaintiff which is signed "H. P. Smith," to the defendant, dated Aug. 30th, 1882.

Letter from defendant to H. P. Smith, Sept. 1st, 1882.

40 NEW YORK, *March* 29, 1882.

DEAR SIR: We have on hand about 1,200 tons of fifty-two-pound steel, your pattern, drilled as follows: Holes seven-eighth inch diameter, two and a half ($2\frac{1}{2}$) and seven and a half inches from end of rail. We may wish to turn these rails in on your May de-

livery; if so, will this delivery suit you? If so it may prove an accommodation to us, and we will drill the balance of your order to correspond, so that the same fish-plate will fit all of the fifty-two-pound rails on your order. We are badly crowded for work, and will consider it a favor if you will try to make the above answer your purpose.

How about the track fastenings; have you done anything about them yet? Please do not forget me when you are ready to close.

41 Awaiting your kind and fully reply by return mail, I am

Yours very truly, C. H. ODELL.

P. S.—I requested Mr. Peck, of Chicago, to call and see you about an extension to Springfield and St. Louis. He is a brother director with me in the I., B. & W. Am just informed you have bo't 5,000 tons steel from A. B. Stone. Why should old acquaintance be forgot? Answer me that if you can.

CHICAGO & IOWA RAILROAD CO.,
GENERAL OFFICE, CHICAGO, *April* 1, 1882.

C. H. Odell, Esq., No. 104 John St., N. Y.

DEAR SIR: Yours of the 29th is received, and I have carefully considered the contents. The first thousand tons of rails that we are to receive under our contract are for repairs of old track, and it will be necessary to have them punched to fit our present plates. If it was for new track independent the punching which you name would make no difference; sorry not to be able to accommo-

42 date you, but do not see how I can well do it.

I have done nothing yet about fastenings; think the market will come to my figures pretty soon.

I will be happy to talk with Mr. Peck, your codirector in the I., B. & W., next time I see him. I know him very well, but had forgotten he was a director of I., B. & W.

In buying rails on a declining market I have been disposed to distribute the benefits around a little bit. I felt when I bought of you that the market was declining a little, but I thought I had got a price far enough under it to be on the safe side, but the next lot I bought cheaper, and presume if I buy any more I can get them still lower. When it gets down to about $50.00 you may book me for another 5,000 tons.

Yours truly, F. E. HINCKLEY.

43 Letter of Odell to Hinckley, dated April 3, 1882, in which it is said: "Your favor of April 1st is at hand and has my attention. Please send me instructions for the drilling of the first 1,000 tons of rails. Of course I see your position and will govern myself accordingly." The rest of the letter relates to furnishing bolts, nuts, and fish-plates, and Odell urges Hinckley to purchase through him such track fastenings.

Telegram from Odell to Hinckley, dated April 20, 1882, which

gives the price of spikes, and says: Send me instructions immediately for drilling 52-pound rails.

Letter from Odell to Hinckley, dated April 20, 1882, in which he confirms telegram, and says: "It is necessary that you send me full instructions immediately about the drilling for the fifty-two-pound rails or your 1,000 tons for May delivery. We have made arrangements to commence rolling them the week ending May 5, and would consider it a favor if you would let us make a clean week's run, viz., 1,300 tons instead of 1,000 tons."

44 Chicago & Iowa R. R. Co. Office, room 76, 204 Dearborn street.

CHICAGO, *April* 24, 1882.

C. H. Odell, Esq., 104 John St., city.

DEAR SIR: I have your letter of April 20 confirming your telegram of same date.

Your industry to sell me fastenings is commendable, but you do not get the price quite low enough. I would prefer Dilworth spikes to an unknown make, and I can buy here Dilworth spike at about the same price which you offer me on the Phil'a spike; and as I am going to be delayed in my operations I do not care to close for the fastenings, especially at present, as I feel that it is on a declining market.

I note what you say about sending instructions for drilling the 52-pound rails, and in reply must beg your indulgence as to the delivery of these rails in May.

We have not made as good progress as was anticipated,
45 being delayed from various causes beyond my control, and am liable to be delayed for some little time to come, and I would like the matter of the delivery to be postponed until later in the season. I cannot say just when we will be able to take them, but will let you know during the next month. I am expecting to go to New York in a short time, and will see you, and will know then more definitely what I will be able to do.

Yours truly, F. E. HINCKLEY.

Substance of letter from Odell to Hinckley of April 24, 1882: "We must have drilling directions immediately."

46 NEW YORK, *April* 26, 1882.

F. E. Hinckley, Esq.

DEAR SIR: In reply to your favor of the 24th ult. will state that our arrangements are all made to roll your rail in accordance with the contract, and if we are compelled to postpone delivery it will cause us considerable inconvenience. It is our desire, however, to accommodate whenever we can, and, with that object in view, I this night send your letter forward to the mill to see if they can arrange to grant you the accommodation asked for.

In relation to spikes I can do no better in Dilworth Porter spikes than three cents delivered at Pittsburgh—freight to Chicago fourteen cents a hundred. If any one offers you these spikes at a less

price, or even at that price, buy them—and I bet you a good hat that you don't get them.

I note that you expect to be here in a very few days and trust you will make my office your headquarters while here. Do not forget that on May 1st I move to 47 Wall street.

47 Awaiting your further and valued favors, I am
Yours truly, C. H. ODELL.

NEW YORK, *April* 28, 1882.

F. E. Hinckley, Esq.

DEAR SIR: In conferring with the mill I find it will be impossible for us to postpone the making of your rails without shutting the works down. Our arrangements are all made to commence on your rails May 15th. I think I therefore am compelled to ask that you forward immediately full and explicit instructions for drilling these rails, so that we can go ahead and make them. Please advise me the very earliest date you can accept delivery of these rails. We will do everything in our power to accommodate you and meet your wishes, but I must have instructions by return mail for drilling these rails, so that we can commence on them at time indicated, even if we are compelled to pile them up in the yard and carry them in stock until some future day.

48 Have kindness to give me full and immediate reply by return mail, and greatly oblige
Yours truly, C. H. ODELL.

Chicago & Iowa R. R. Co. Office, room No. 76, 204 Dearborn St.

CHICAGO, *May* 1*st*, 1882.

C. H. Odell, Esq., 47 Wall St., 2nd floor, N. Y.

DEAR SIR: I am this morning in receipt of your two letters of Ap'l 26 & 28, and in reply have to say that I do not wish to give the punching directions for the 52-lb. rails at this time. My plans are not sufficiently matured to know just when or where I shall lay them, and I think your people must arrange to roll on some other order and let this matter rest until my plans are more fully perfected; am very sorry to disappoint you and your principals, but it cannot be helped.

Yours truly, F. E. HINCKLEY.

49 PITTSBURGH, *May* 13, 1882.

F. E. Hinckley:

It is absolutely necessary that you should give drilling directions for fifty-two-pound rails, that we may keep our mill going. Can you not do so at once by wire? Answer.

PITTSBURGH BESSEMER STEEL CO. (LIMITED).

CHICAGO, 13.

To Pittsburgh Bessemer Steel Co., L't'd, P'gh:

Cannot give drilling directions at present.

F. E. HINCKLEY.

PITTSBURGH, *June* 12, 1882.

F. E. Hinckley, Esq.

DEAR SIR: We are to-day informed that Western rates will all be advanced, both rail and lake, on or about July 1st.

Can you not give us some definite idea as to when your rails will be wanted, so that we may make contract now for transportation and save ourselves probably one or two dollars per ton?

Awaiting your reply, we are

Very truly yours, H. P. SMITH,

For the Bessemer Steel Co. (Limited).

Chicago, Pekin & Southwestern railroad. President's office, 204 Dearborn street.

CHICAGO, *June* 15, 1882.

H. P. Smith, Esq., for The Pittsburgh Bessemer Steel Co., 87 Wood St., Pittsburgh, Pa.

DEAR SIR: I have your letter of the 12th, and in reply am unable to give you any definite idea as to when the rails will be wanted. The continued rains have made it almost impossible to even survey a line, saying nothing about grading, and we are really but little further along than we were last January, and I feel a little bit discouraged about being able to use the rails this season.

Yours truly, F. E. HINCKLEY.

51 PITTSBURGH, *June* 23, 1882.

F. E. Hinckley, Esq.

DEAR SIR: Your valued favor of 15th received and noted.

Kindly note that we are ready to commence rolling on our contract with you for July deliveries, also to cover 1,000 tons specified for May, which we are prepared to roll and deliver in that month, but which you asked us to postpone.

As we paid high figures for the material to make these rails, and have no work for our mill in place of it, we must respectfully ask you to furnish patterns and specifications, as provided in the contract, without further delay, and trust you may be in shape to do so.

Very resp'y yours, H. P. SMITH.

For The Pittsburgh Bessemer Steel Co., Limited.

52 NEW YORK, *July* 26, 1882.

To Pittsburgh Bessemer Steel Co.:

What do you say to giving me six to twelve months' time on four to six thousand tons rails, with the rails secured? I can get the money to complete road, but without the rails I can do nothing. Odell will wire you; will give you note of sixty, with my endorsement, and first-mortgage bonds as collateral at fifty cents; think the paper would be good; come down; wire and let us fix the matter up.

F. E. HINCKLEY.

PITTSBURGH, *July* 26, 1882.

To F. E. Hinckley:

We are not prepared to sell rails on the terms you propose.

THE PITTSBURGH BESSEMER STEEL CO., L'T'D.

53 PITTSBURGH, *August* 30, 1882.

F. E. Hinckley, Esq.

DEAR SIR: We have been anxiously waiting some reply from you to our respects of June 23d, and would remind you that the time for the completion of your contract with us has expired. We shall be pleased to know at once whether you expect to take the rails or not, and would esteem it a favor if you will be perfectly frank with us in the matter, as we are disposed to do anything that we can do to accommodate you, and we are confident it would be for the interest of all parties to have a personal interview, and would suggest that, if you can make it convenient to do so at an early day, it would be well for you to meet our board in person here. Kindly make prompt reply, as we wish to have the matter disposed of without delay.

Yours truly, H. P. SMITH.

54 Chicago, Pekin & Southwestern railroad. President's office, 204 Dearborn street.

CHICAGO, *Sept.* 1, 1882.

H. P. Smith, Esq., Pittsburgh, Pa.

DEAR SIR: I am in receipt of your letter of Aug. 30, and note your suggestion that you would like to see me in Pittsburgh, and personally I should very much like to see you and your people, but my engagements are such that it is impossible for me to get away at this time. At some future time I may be able to visit you, or perhaps it would be convenient for you to meet me in New York at some time in the near future. If not, could you not make it convenient to come to Chicago at your pleasure, as I expect to remain here pretty steadily for the next few months?

Yours truly, F. E. HINCKLEY.

55 The plaintiff then read in evidence a notice, dated September 15th, 1882, signed for the plaintiff by Jewett, Norton & Larned, its attorneys, asking defendant to furnish drilling directions and to carry out his contract, and proof was made that such notice was delivered on the day of its date.

James S. Norton testified that he was one of the attorneys for the plaintiff; that he served a written notice on the defendant September 15th, 1882, demanding drilling directions, and offering to carry out the contract; that Hinckley then said that he declined to take any rails whatever under the contract; that he had made other arrangements for the rails at *a* good deal better figures. On cross-examination he said that Hinckley claimed at that time that he

was under no obligation to give drilling directions in advance of the delivery, and that he was not bound to take the rails at that time.

The plaintiff then called C. H. Odell as a witness, who tes-
56 tified that he resided in New York; that he was now an agent for the plaintiff, but was not at the time of making the contract, but that under special instructions from the plaintiff he concluded the contract exhibited by the written agreement read in evidence. He also testified that he had an interview in the summer of 1882 with the defendant at the office of witness, in New York, at which the defendant said that, owing to the death of Moses Taylor, he had been disappointed in getting money to enable him to build his road, and was then in New York trying to make an arrangement with Moses Taylor's heirs to carry out the original agreement with Moses Taylor, and if he could accomplish that he would get the money, build the road, and take the rails. He said he had not the money then to pay for them, and if they were shipped he could not pay for them; that they might as well, under the circumstances, throw up the sponge and consider the contract canceled. The defendant wanted to make a new arrangement on a time basis to pay for them in six and twelve months with the notes of the company, indorsed by him, and these to be secured by the bonds of the company at about fifty cents on the dollar. The witness suggested that the proposition should be made to the plaintiff direct, and on this suggestion the telegram, which had been read in evidence, of July 26th, 1882, was sent.

On cross-examination the witness testified that he became agent for the plaintiff in March, 1882, and that his authority was limited to that of a sales agent, and that he had no authority to act for or bind the company in any other respect.

57 The witness further testified that all of his communications with the plaintiff in regard to the business of the defendant were in writing; that he wrote his company at Pittsburgh and received letters in answer thereto, or the business may have been partly done by wire; that he kept the plaintiff fully advised of his correspondence with defendant concerning these rails. The letters and telegrams received by the witness were in his possession in New York. He also said that he had no general authority from the plaintiff to act for it; that his instructions were contained in letters received.

The plaintiff then called H. P. Smith, who testified that he resided in Pittsburgh and was the business manager of the plaintiff, having general superintendence under the direction of the board of directors. He testified that shortly after the contract was negotiated *that* Odell was appointed general selling agent in New York; that Odell negotiated this contract, but under special instructions.

The plaintiff's attorney then asked the witness if the plaintiff company was advised of the correspondence read in evidence, and was advised of what Odell was doing, saying, and asking on behalf of the company, and advised of Odell's correspondence and actions with regard to the contract and delivery of rails, as shown by the

correspondence read in evidence, and if Odell's actions were approved by the witness as manager of the plaintiff company; to all of which the defendant objected, because it appeared from the evidence that there had been no verbal communications between Odell and the plaintiff, but that the same consisted of letters and
58 telegrams, as shown by the testimony to be in the possession of Odell and of the plaintiff, and that such letters and telegrams were the only competent evidence of the contents thereof; but the court overruled the objections and allowed the witness to answer the questions, who stated in answer thereto that the company was advised of the correspondence and actions of Odell and of what he was doing, saying, and asking in behalf of the company and fully approved and ratified the same, and the defendant excepted to the decision of the court in allowing said questions to be answered.

The witness then testified to certain conversations in May and June, 1882, with the defendant, which tended to show an application to the defendant to give drilling directions and to state when he could take the rails, and that the defendant said that he could not take the rails in May, as provided by the contract, and could not tell when he could take them, and that the witness said that unless the drilling directions were given they would be compelled to stop the plaintiff's mill. Defendant said he did not then know how he should want them drilled.

Witness also testified to a later conversation with defendant in which he told defendant that the material had all been purchased and that unless he gave drilling directions and stated what pattern he wanted to use (as he had privilege in the contract of using two patterns) the plaintiff would be compelled to stop its mill; that the plaintiff had made such arrangements in contemplation of defendant's contract that unless he gave the drilling directions to enable plaintiff to roll the rails plaintiff would be without work. Defendant replied that he was sorry, but he could not give the
59 drilling directions and could not receive the rails or say when he could.

The witness was then asked why the rail specified in the contract were not furnished to the defendant, to which he replied, "Because we could not induce him to say that he would receive them or give us drilling directions to enable us to roll them."

To which question and answer the defendant objected, but the court overruled the objection and the defendant excepted.

The witness testified that the plaintiff, immediately after the making of the contract, purchased the material with which to roll the rails mentioned in the contract, and had the material on hand to roll the first thousand tons for the May delivery, and also had the material on hand to roll the rails to be delivered in July and August.

The plaintiff then asked the witness to state the elements of cost for rolling the rails in detail.

To this question the defendant objected, but the court overruled

the objection and allowed the witness to answer; to which decision the defendant excepted.

The witness then produced a memorandum showing certain items taken from the books of plaintiff, which added together exhibited the cost of manufacturing one ton of such iron rails as those described in the contract in the month of August, 1882, and plaintiff's attorney asked the witness to testify to the items specified in the memorandum.

60 To this testimony the defendant objected, but the court overruled the objection and allowed the witness to read the items from the memorandum.

The witness then testified that he did not know the market price in Chicago of steel rails in May, 1882, or in either July or August of that year, nor the market price at either of said times in Pittsburgh, and that he could not state it without reference to the books of the plaintiff, but that he knew the market price at Pittsburgh was something less than the price named in the contract, and that the market, after the making of the contract, declined rapidly. Witness, referring to conversations about necessity of stopping mill unless orders were given to carry out the contract, testified that plaintiff's mill was obliged to stop and that plaintiff had facilities for completing this contract within time provided; that it would have occupied the mill 3 or 4 weeks to make the whole quantity.

On cross-examination the witness [testified] that there was some conversation with Hinckley, in which he said that the first thousand tons of rails would be wanted of the 52-pound pattern to relay some old track, and that the remainder would be wanted of the 56-pound pattern, but he did not recollect that there was anything special said about the two quantities with reference to the May delivery or the deliveries in July and August. The witness

61 testified that there was no agreement with Hinckley to postpone the execution of the order and no waiver of the time of delivery. He also testified that the mill was closed for about three weeks during the month of July.

The witness was then asked by plaintiff's attorney—

Q. Having the material and knowing the cost for the filling of this contract, please state what it would have cost your company to have filled it and to have delivered the rails in Chicago, if Mr. Hinckley had taken them—the cost per ton.

Objected to. Objection overruled. Exception by counsel for defendant.

A. That is, delivered in Chicago?

Q. Delivered in Chicago.

A. The cost at that time would have been, say, $48.25, or within a few cents either way.

Q. And the actual cost of delivering them in Chicago to your company would have been $48, you say?

A. $48 and about 25 cents.

Q. Can you state the elements of that cost?

A. I can give you all the items of material, but not the exact cost of each one without reference to a memorandum which I gave to Mr. ——.

Q. Is this a memorandum prepared by yourself? (Exhibiting paper to witness.)

A. Yes, sir.

Q. Where did you get the elements to make it up from?

62 A. From our books.

Q. Did you know the purchase price of material which you have figured upon this paper?

A. Yes, sir; I knew the price of everything that went into the manufacture, because I purchased it all myself.

Q. Is this the statement that you refer to? (Handing paper to witness.)

A. Yes, sir.

Q. What amount of steel rails is figured upon that statement? Is it for one ton?

A. Yes, sir; the cost of one ton.

Q. Of one ton of steel rails?

A. 2,240 pounds.

Q. Will you state to the court now, referring to the memorandum to refresh your recollection, exactly the items of cost to the company rolling these rails—the elements, material, and everything else?

Objected to by the defendant. Objection overruled and exception taken.

The COURT: You may answer that or give me the memorandum.

Mr. JEWETT: Does this statement include the freight from Pittsburgh to Chicago?

A. No, sir.

Q. What were your freight rates per ton?

A. $3.

Q. What is represented by this statement?

A. The actual cost of the rails delivered on the cars at our works.

Q. And to that would be added the freight to Chicago to make up the $48 as you mentioned it?

63 A. That is it.

Q. And that statement was prepared by you from your personal knowledge of its cost?

A. Yes, sir.

Q. And what is the amount of cost per ton of steel rails, according to that statement?

A. $45.12.

Q. That statement was made by yourself?

A. It is not in my handwriting.

Q. Made under your supervision?

A. The items were called off by me from a pencil memorandum to our book-keeper, who wrote them down on a piece of paper.

Q. Do you know the items to be correctly stated?
A. I do, sir.

On cross-examination on this point by Mr. GOUDY the testimony is as follows:

Q. You have furnished a statement here of the cost of one ton of steel rail at your mills, headed "estimated cost August 1st, 1882," and stated that that was the cost delivered on the cars at your mill; now, how did you get the information as to the items making up that cost?

A. From our books.

Q. It was not taken as to that particular date from your books?

A. No, sir; it was made up from our records running through a series of months; I am not sure whether it was four or five months; but my recollection is that it commenced either on the 1st of April or the 1st of May and run through till the first of August.

64 Q. You undertook to get an average as to the cost per ton, didn't you?

A. Yes, sir.

65 He also testified that no rails were rolled for Hinckley under the contract.

He also testified that at the time the contract was made with Hinckley the plaintiff had orders and contracts for rolling rails for other parties; that material was purchased, chiefly pig-iron and spiegel-iron, the two most expensive articles that go into the manufacture of rails, at different times; that the plaintiff purchased material to cover the contract with defendant; that it was their custom to cover sales of rails by purchase of material; that said material was mixed, and there was no way of distinguishing as to what material was purchased to manufacture the rails for Hinckley from *those* of others, and there was no way of determining what particular material went into the manufacture of any particular lot of rails. He could not give the quantity of material purchased or the dates when bought without reference to the books of the plaintiff. The capacity of the mill was from 6,000 to 7,000 tons per month. It ran during the entire time except about three weeks in July. He testified that the market price of rails from the time of the contract to the time for the last delivery was decreased from $9 to $12 per ton, and that there was a decline in the same time for material, but not so much; the amount he could not state. There was no variation in the cost of material to plaintiff for this contract during the period fixed for the deliveries, as the material had been purchased. The statement used was taken from the records of the plaintiff

66 running from April or May to August, and was intended to give the average cost per ton.

The witness testified that in consequence of the failure of Hinckley the plaintiff was compelled to work up the material into iron which was sold at a lower rate. It was very difficult to tell how much lower, because it was put into half a dozen different lots. 4,000 tons were sold with special reference to filling up this date at which Hinckley said he could not receive the rails. We sold 4,000 tons to

a road in Michigan on my way from Chicago, either going or coming, at a price below the Hinckley contract. It was equivalent to about $49 at the mill for 52-pound rails. The price of these rails delivered was $54.40 or $54.60. These were 35-pound rails, and hence they cost more to manufacture than those of the weight called for by the contract, and the profit on the manufacture of such light rails was much less.

The plaintiff rested, and the defendant called L. S. Boomer as a witness.

He testified that he was connected with the Union Iron and Steel Company, in Chicago. He said the price of steel rails in Chicago in May was $54 per ton; in July it was $52. It cost to manufacture rails in Chicago in the month of May $55 per ton, a little higher than the market price, and substantially the same in July and August.

R. R. Jones was called by the defendant.

He was connected with the same company as general superintendent. He testified that drilling was to make the holes in the end of the rails, through [which] bolts were passed and fastened to fish-plates and tied the rails; that one inch in distance between the holes would cover the variation of the different drilling in their mill.

67 There was little or no difference in the diameter of holes or in the distance from the top of the rail. Drilling is usually done as soon as the rails leave the hot-bed after they were straightened, in the neighborhood of two hours after they were rolled. If not done then, but after the rails have been piled up so that it was necessary to take them down, it would cost from twenty to twenty-five cents a ton additional, if no necessity to resort to cars. The difference in the different drilling made no difference in the durability, strength, or quality of the rails.

On cross-examination the witness testified that it was usual to receive directions for drilling before we actually commenced the rolling, and that they never drilled the rails until after receiving instructions.

Lewis T. Moore testified that he was civil engineer in the employ of the Illinois Central Railroad Company. He said the difference in drilling is in the distances from the end of the rails; that when the rails were drilled for the Illinois Central railroad the directions were always given before the rolling; that the drilling varies with different roads.

On cross-examination he said that if a mistake was made as to the distance for drilling the holes it would be necessary to get new fish-plates.

H. C. Draper testified that roads have special requirements in drilling. If the holes were half inch out of the way the rail would have to be rejected or new fish-plates ordered.

68 The defendant, Francis E. Hinckley, was sworn and testified that in the conversation about the use of rails it was said

that the 52-pound rails were to be used on the old road, and that was to be the number five pattern, and that the 56-pound rails were to be used on the new road, which [is] an extension of the old, being a new line from Chicago to Coal City. It would take about five thousand tons to build the new road, and they expected to lay a portion of the old line with the other thousand tons. The witness stated to Odell and Smith that the one thousand tons were to be used for relaying the old line.

The witness said there was no agreement at any time to extend the time for the delivery of the rails after the written contract was made. The price of rails in May, in Chicago, 1882, fifty-two pounds to the yard, was $54 and $55.

Thomas Jordan, the engineer of the Chicago, Burlington and Quincy Railroad Company, testified that plans were usually made for the rails and fish-plates, together with the drilling, so that they would correspond to each other; that when rails were imported, which were kept for sale, they were drilled without reference to any order in advance, but some of them were not drilled until they reached this country; that the C., B. and R. R. Co. are using 4 different kinds of rail, different in weight and size, and the drilling is different in all of them.

On cross-examination he said it was usual with his company to give directions for drilling before the rails were rolled. A rail is not now considered finished until it is drilled. It is part of the manufacturer's business to drill the rails. Rails were formerly drilled by roads themselves, but now steel rails are always drilled at the
69 mills. His Co. keeps an inspector at each mill where rails are rolled in sufficient quantity to see that the specifications as to drilling are carried out. If the rails are not drilled according to specifications our inspector rejects them. It is very important where rails are ordered to continue an old line to have drilling exactly same as in old rails. Almost every road has its own system of drilling, as to distance of holes from end of rails.

H. P. Smith, recalled, testified that the rate of freight on Michigan rails was about $4 to Port Huron.

H. Duval testified that he was engaged in the business of selling pig-iron with the house of Cherry & Co.; that there was a change in the price of pig-iron from the first of March to the first of September, 1882; it went from $29.50 to $25.75; in August the price was $26.00 per ton; in March, $29.50; in September, $25.75; does not know price of pig-iron in Pittsburgh from March to September, 1882.

F. K. Boos testified that he was an iron broker in Chicago, and that the standard rail of fifty-two pounds is worth about five thousand dollars to the mile, and the fish-plates would be worth
70 about one hundred and thirty dollars to the mile; that if the drilling was not suitable to the fish-plates, it would necessitate the purchase of fish-plates which were.

On cross-examination he testified that if he ordered rails he would expect to give the drilling directions with the order.

F. S. Boos was recalled and testified that there was no difference between the market price of rails which had been already drilled and rails that are ordered to be manufactured and drilled according to instructions.

F. E. Hinckley, recalled, says they use on the Chicago, Pekin & S. W., witness' road, three or four different drillings.

The defendant rested.

The plaintiff then called Richard C. Hannah, secretary of the North Chicago Rolling Mill, in Chicago, and he said that the expense of manufacturing steel rails in Chicago delivered there during 1882 was about $50.00 a ton, and that the expense of manufacturing them in Pittsburgh and delivering them in Chicago, the shipper to pay the freight, was about the same thing as manufacturing them in Chicago and delivering them there. He testified that the market price of rails in May was about $54.00 or $55.00; in July the price was as much as $55.00, if not more; that his statement of cost of manufacture of rails in Chicago during 1882 is made upon the cost to the Chicago Rolling Mill Co., and their material
71 was all purchased in advance of that year, so that the fluctuation in price of material did not effect them.

This was all the testimony, and thereupon, after consideration, the court found the issues for the plaintiff and assessed the damages at $42,400.00.

The court also filed at the time of rendering judgment in the case, to wit, July 28, A. D. 1883, the following special finding of facts in the case:

72 *Special Findings.*

PITTSBURGH BESSEMER STEEL COMPANY
vs.
FRANCIS E. HINCKLEY.

BLODGETT, *J.:*

The above-entitled cause having been submitted to the court for trial without the intervention of a jury, and the proofs and arguments having been heard, I find from such proofs the following facts:

1. That the written agreement set out and described in the declaration was duly executed by the plaintiff and defendant in said cause, as alleged in said declaration.

2. That immediately after the making of said contract, and before the time to begin the execution thereof, the plaintiff purchased the requisite amount of material from which to manufacture the six thousand tons of steel rails called for by said contract, and that after the purchase of said supplies by plaintiff there was a decline in the value thereof before the time for the delivery of any portion of said rail, and that lower prices for such supplies ruled during the months of May, June, July, & August, 1882.

3d. That it appears from the parol proof heard on said trial, aside from the provision in said written contract in regard to drilling
73 directions, that it was usual and customary for the purchaser of steel rails to give directions as to the drilling thereof, and that each railroad company has its own special rules for drilling, and the drilling of such rails is considered in the trade as a part of the work of manufacture and a part of the duty of the manufacturer in order to fully complete the rails for use.

4th. That by letters dated April 3, April 20, April 26, and April 28, from plaintiff's agents to defendant, and which letters were duly received by defendant before May, 1882, defendant was requested to furnish drilling directions for the rails to be delivered in May under said contract, and defendant not only neglected to comply with such request and furnish such directions, but defendant also notified plaintiff, in reply to such request, that he, defendant, was not then prepared to receive the rails which were to be delivered under said contract in the month of May.

Again, about the 15th of June, defendant informed plaintiff that he was becoming discouraged about being able to take the rails.

That about June 23 plaintiff notified defendant that it was ready to commence rolling the rails for the July deliveries, as well as to cover the thousand tons specified in the contract for delivery in May, of which plaintiff had postponed delivery at defend-
74 ant's request, and asked for drilling directions from the defendant, but defendant wholly neglected to give such drilling directions.

That about the 26th of July defendant in substance informed plaintiff's agents that his financial arrangements for money to pay for said rails, pursuant to said contract, had failed, and that he could not take said rails unless plaintiff would sell them to him on six and twelve months' credit, for which the notes of the railroad company for which defendant was acting would be given, which defendant would endorse and also further secure with first-mortgage bonds as collateral at fifty cents on the dollar, but unless he could secure the rails on such terms he could not take them, and that plaintiff declined to accept said proposition for the purchase of said rails on credit; and I further find that on the 30th of August, 1882, plaintiff notified defendant that the time for the completion of his contract for the purchase of said rails had expired, and requested defendant to advise it whether he would accept the rails or not. To this request defendant made no reply.

I further find that while plaintiff did not expressly agree with defendant to postpone the time for the delivery of the rails to be made and delivered under said contract, yet plaintiff did in fact delay the rolling and delivery of the rails to be delivered in
75 May, and that, by reason of the repeated statements of defendant that he was not ready to give drilling directions, not ready to use said rails, and not ready to accept them, plaintiff did postpone rolling said rails, and in fact never rolled any rails to be delivered on said contract, but that plaintiff was at all times during the months of May, July, and August ready and able in all respects

to fulfill said contract and make said rails, and the same would have been ready for delivery as called for by said contract if defendant had furnished drilling directions, and had not stated to plaintiff's agents that he was not ready to furnish said drilling directions and not ready to accept said rails.

I further find that on or about the 15th day of September, 1882, defendant was formally requested to furnish drilling directions and to accept said rails, and that he replied to such request that he should decline to take any rails under said contract, and that he had made arrangements to purchase rails of others at a good deal lower price.

I therefore find from the testimony in this case that defendant, by requesting plaintiff to postpone the delivery of said rails, and by notifying the plaintiff that he was not ready to accept and pay for said rails, excused the plaintiff from the actual manufacture of said rails and a tender thereof to defendant.

76 And I further find that defendant's statement to plaintiff on the 26th of July that he could not pay cash for said rails, as called for by the contract, and that he wished to buy them on credit, was in fact a notice that he would not be able to pay for said rails if rolled and tendered to him by plaintiff.

I therefore conclude, and so find as a matter of fact, from the evidence in the case, that said plaintiff in apt time requested defendant to furnish directions for the drilling of said rails, and that defendant neglected and refused to do so, and that, although plaintiff was ready and able to fully perform said contract and make and deliver said rails to defendants, as required by said contract, defendant refused to accept and pay for said rails.

5th. That plaintiff manufactured and sold to other persons 4,000 tons of steel rails from the materials so purchased with which to perform said contract with defendant, for which said rails plaintiff received $54.60 per ton, delivered at a port on Lake Huron, and that plaintiff made a profit of $1.60 per ton on said 4,000 tons; that by reason of defendant's refusal to accept said rails the plaintiff had no employment for its mill for a time, and was obliged to stop its mill for about three weeks in the month of August, 1882.

77 6th. That it would have cost plaintiff $50 per ton to have manufactured and delivered the rails called for by said contract to defendant, according to the terms of said contract; so that plaintiff's profits, if it had not been prevented from fulfilling said contract by the conduct of defendant, would have been $8.00 per ton on each ton of rails called for by said contract.

And, because of said facts, I find that defendant was guilty of a breach of said contract, and that plaintiff hath sustained damage, by reason of such breach, in the sum of $42,400.

H. W. BLODGETT, *Judge.*

Endorsed: Filed July 28, 1883. W. H. Bradley, clerk.

And the defendant objected to the decision of the court in each and every one of the findings aforesaid, but the court overruled the several objections; to which the defendant excepted.

And, forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this his bill of exceptions, and prays that the same may be signed and sealed by the judge of this court pursuant to the statute in such case made.

78 *Statement of Facts upon which the Foregoing Bill of Exceptions is Certified.*

The decision in this case was announced and judgment entered on the 28th day of July, 1883. At the time of the entry of judgment the defendant, by his attorney, Mr. Goudy, orally excepted to the finding of the court, and asked for time in which to prepare and present to the court a bill of exceptions, and the court stated to him that he could have until the first day of October then next in which to prepare and present such bill of exceptions, and a memorandum to that effect was entered by the court upon the judge's docket of the case, it being the practice of the court not to enter an order of record extending the time for preparing and presenting to the court a bill of exceptions, but to note the same on the docket and file the bill of exceptions when settled as of the date of the judgment. The foregoing bill of exceptions was not presented to me until this 13th day of October instant, but I am informed, and so understand from counsel on both sides, that on the 6th of October Mr. Goudy applied to Messrs. Jewett, Norton and Larned, plaintiff's attorneys, for a further extention of time in which to prepare his bill of
79 exceptions, to which they in substance replied that as they understood it the time given him by the court for presenting and filing his bill of exceptions had expired on the first day of October. Mr. Goudy insisted that he had until the 6th of October to prepare and present to the court his exceptions, and plaintiff's attorneys then agreed orally that if he had the right to file it on the 6th he might prepare it as early as possible, and it could be considered as prepared and presented in apt time if the 6th of October was in fact the time on which, by the order of the court, the exceptions must be presented. But I understand the plaintiff's attorneys insist that said bill of exceptions should have been presented on or before the first of October and refuse to consent to the filing of the bill of exceptions at this time or at any date later than the time fixed by leave of court as entered on the docket. Mr. Goudy urges that he was acting upon the impression that he had the right to file the bill of exceptions within sixty days, excluding Sundays, after the rendition of the judgment, and has filed his affidavit giving his
80 understanding of the matter, a copy of which may be appended to this record as Exhibit "A."

It being now contended on behalf of plaintiff that defendant has no right to have a bill of exceptions filed after the first day of October, and plaintiff's attorneys not consenting that the same may now be signed with the same effect as if presented on the first of October, but it being agreed between the attorneys for plaintiff and defendant that the foregoing is substantially a correct statement of the testimony on the trial, I have directed the clerk to include it in the

record, so as to give the defendant the benefit of the bill of exceptions, if, under the facts, the Supreme Court shall be of opinion he was entitled to have the same filed if presented to the court on the 6th instant, or at any time after the first instant. By a rule and order of this court, upon which it has acted for many years, an adjourned term is held commencing on the first Monday in October in each year.

Dated this 13 day of Oct., 1883.

H. W. BLODGETT, *Judge.*

81 EXHIBIT "A," referred to in judge's certificate.

Affidavit of W. C. Goudy.

In the Circuit Court of the United States for the Northern District of Illinois.

THE PITTSBURGH BESSEMER STEEL COMPANY (Limited)
vs.
FRANCIS E. HINCKLEY.

William C. Goudy, being sworn, says that he is the attorney for the defendant in this case, and as such has had exclusive charge of it during and since the trial in the circuit court.

And deponent further says that the invariable custom and practice in this court has been for many years, and now is, not to prepare and present to the judge a bill of exceptions on the trial, but, at some time after the trial is concluded, to prepare a bill of exceptions, present it to the party, and then to the judge for his signature, when it is signed as if presented at the time the exception was taken. It is not and has not been the custom of this court to enter any order of record fixing any specific time in which the bill of exceptions should be presented and signed, but it has been the custom for the party who desires to have a bill of exceptions signed and made part of the record to ask for some time in which to
82 present the same for signature to the judge, and the judge makes some memorandum or note, which is not entered of record, to show the time that has been asked and granted.

The deponent further says that at the time the judgment was rendered it was the intention of the defendant to prosecute a writ of error and file a supersedeas bond, and this deponent, knowing the fact, asked for some time in which to present the bill of exceptions, and whatever time was asked was allowed.

Deponent further says that he understood that he had granted to him the same time for the presentation of the bill of exceptions as is given by section 1007 of the Revised Statutes for suing out a writ of error and giving the security upon a supersedeas bond, which is sixty days, Sundays exclusive, after the rendering of the judgment complained of; that, so understanding, he relied upon having that time in which to present the bill of exceptions.

Deponent further says that it now appears from a memorandum made by the judge who tried this case that the time noted was Octo-

ber 1st, and not sixty days, Sundays exclusive, from the time the judgment was rendered.

This deponent says that he prepared, partially, a bill of exceptions within sixty days, Sundays exclusive, from the time the judgment was rendered, and, being pressed for time, applied to the attorneys for the plaintiff for some additional time, and they
83 agreed that additional time might be granted, or, rather, that the bill of exceptions, when presented a few days later, might be treated as presented within said sixty days, but claimed at the same time that the time allowed had expired.

And this deponent says that he prepared a bill of exceptions, submitted it to the attorneys for the plaintiff, and presented it to the judge the day after the said sixty days had expired, when some objection was made to its correctness by the adverse attorneys, and the examination and changes required thereby allowed four more days to elapse before the attorneys on both sides agreed to its correctness, when it was left with the judge, on the 13th day of October, 1883.

WILLIAM C. GOUDY.

Subscribed and sworn to before me this 13th day of October, A. D. 1883.

[SEAL.] EDWIN STEWART,
Notary Public.

Endorsed: Filed October 13, 1883. Wm. H. Bradley, clerk.

84 Afterwards, to wit, on the eighth day of October, A. D. 1883, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Supreme Court of the United States.

FRANCIS E. HINCKLEY
v.
THE PITTSBURGH BESSEMER STEEL COMPANY.

Know all men by these presents that we, Francis E. Hinckley, as principal, and George W. Hinckley and William S. Hinckley, as sureties, all of the northern district of Illinois and residents of the State of Illinois, are held and firmly bound unto the Pittsburgh Bessemer Steel Company, of Pittsburgh, in the State of Pennsylvania, in the sum of five hundred dollars, to be paid unto the said Pittsburgh Bessemer Steel Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals [and] dated this — day of October, A. D. 1883.

85 Whereas the above-named Francis E. Hinckley hath prosecuted a writ of error to the Supreme Court of the United

States to reverse the judgment rendered in the case wherein the said Pittsburgh Bessemer Steel Company was plaintiff and the said Francis E. Hinckley was defendant by the United States circuit court for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Francis E. Hinckley shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

FRANCIS E. HINCKLEY. [SEAL.]
GEORGE W. HINCKLEY. [SEAL.]
WILLIAM S. HINCKLEY. [SEAL.]

Approved:
H. W. BLODGETT, *Judge.*

Endorsed: Filed Oct. 8th, 1883. Wm. H. Bradley, clerk.

86 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein The Pittsburgh Bessemer Steel Company, Limited, is the plaintiff and Francis E. Hinckley is the defendant, as the same appear- from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this thirteenth day of October, A. D. 1883.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY, *Clerk.*

87 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said circuit court, between The Pittsburgh Bessemer Steel Company, plaintiff, and Francis E. Hinckley, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Francis E. Hinckley, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1883, in the Supreme Court to be then and there held, that,

the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the 108th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

87½ [Endorsed:] Supreme Court of the United States. Francis E. Hinckley *vs.* Pittsburgh Bessemer Steel Company. Writ of error.

88 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To the Pittsburgh Bessemer Steel Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1883, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Francis E. Hinckley is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-three.

H. W. BLODGETT, *Judge.*

89 [Endorsed:] Supreme Court of the United States. Francis E. Hinckley *vs.* The Pittsburgh Bessemer Steel Company. Citation to October term, A. D. 18—. Service by copy accepted this sixth day of October, A. D. 1883. Jewett, Norton & Larned.

Endorsed on cover: N. Illinois, C. C. U. S. No. 188. Francis E. Hinckley, plaintiff in error, *vs.* The Pittsburgh Bessemer Steel Company. Filed 22nd October, 1883.

121-264

TRANSCRIPT OF SUPPLEMENTAL RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 188.

FRANCIS E. HINCKLEY, PLAINTIFF IN ERROR,

vs.

THE PITTSBURGH BESSEMER STEEL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED MARCH 1887.

IN CIRCUIT COURT UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

Hon. Henry W. Blodgett, *Judge.*

SUPPLEMENTAL PROCEEDINGS.

The Pittsburgh Bessemer Steel Company, Limited,
vs.
Francis E. Hinckley.
} *Assumpsit.*

NORTHERN DISTRICT OF ILLINOIS, ss.

Be it remembered, that heretofore, to wit: on the 8th day of January, 1887, the said plaintiff, by its attorney, John N. Jewett, Esq., filed in said court its *remittitur* and motion in said entitled cause in words and figures following, to wit:

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR SAID NORTHERN DISTRICT OF ILLINOIS.

The Pittsburgh Bessemer Steel Company (limited)
vs.
Francis E. Hinckley.
} *Assumpsit. Judgment, July 28, 1883, for $42,400 and costs.*

And now comes the said plaintiff, by John N. Jewett, its attorney, and shows to the court that it appears from the record of the proceedings in the above entitled cause and especially from the opinion of the court and the "special findings" filed therein and made a part of said record, that an arithmetical mistake was made by the court in the finding and judgment in said cause by which the said judgment was rendered for a greater amount than it should have been by the sum of eight hundred dollars ($800), the said judgment having been entered for the sum of forty-two thousand four hundred dollars ($42,400), whereas, upon the basis of the finding of the court, it should have been for the sum of forty-one thousand six hundred dollars ($41,600), besides costs. And the said plaintiff being recently advised of said mistake, and for the purpose of correcting the same, does now and hereby *remit* from the amount of the said judgment the said sum of eight hundred dollars ($800), as of the date of the entry of the same, and moves the court that an

order be entered in said cause remitting said sum of eight hundred dollars ($800) from the amount of said judgment, as of the date thereof, and directing the clerk of this court to write a *remittitur* of said sum of eight hundred dollars ($800) upon the record of said judgment in pursuance of said order.

JNO. N. JEWETT,
Atty. for Plff.

(Endorsed): Filed January 8, 1887.
WM. H. BRADLEY, *Clerk.*

And thereupon, on the same day, to wit: on the 8th day of January, 1887, in the record of the proceedings of said court in said cause, appears the following entry, to wit:

The Pittsburgh Bessemer Steel Company (limited)
vs.
Francis E. Hinckley.
} *Assumpsit.*

In the matter of the written motion of said plaintiff to remit eight hundred dollars ($800) from the judgment entered in said cause July 28, 1883.

The Pittsburgh Bessemer Steel Company (limited), plaintiff, in the above entitled cause, by John N. Jewett, its attorney, having this day presented to the court its written statement and motion, represented and showing that an arithmetical error, whereof said plaintiff has recently been advised, was made by the court in the finding and judgment in said cause, by which the said judgment was rendered for a greater amount than it should have been, by the sum of eight hundred dollars ($800), the said judgment having been entered for the sum of forty-two thousand four hundred dollars ($42,400) and costs, whereas, upon the basis of the findings of the court it should have been for the sum of forty-one thousand six hundred dollars ($41,600), besides costs, and wherein it now remits from said judgment the said sum of eight hundred dollars ($800) and moves that an order be herein entered as of the date of the entry of said judgment, remitting the said sum of eight hundred dollars ($800), and also that the clerk of this court be directed to write a *remittitur* of said sum of eight hundred dollars ($800) upon the record of said judgment.

The court being now fully advised in the premises, and the said written statement and motion having been filed, it is now ordered that a *remittitur* by the said plaintiff of the sum of eight hundred dollars ($800) be entered in said cause from the amount of the judgment heretofore entered therein, and as of the date thereof, and that the clerk of this court write the same upon the record of said judgment.

A *remittitur* of eight hundred dollars is hereby entered on this judgment, as of its date, as per order of the court herein of the date of January 8, 1887.
WM. H. BRADLEY, *Clerk*.

And thereupon, in conformity with said last recited order of the court, an entry of *remittitur* of eight hundred dollars on said judgment of the date of July 28, 1883, in said cause, was endorsed on the margin of the record of said judgment, which said judgment, together with said *remittitur* so entered, are in the words and figures following, to wit:

The Pittsburgh Bessemer Steel Company (limited)
vs.
Francis E. Hinckley.
} *Assumpsit.*

Now, on this day, come the parties, by their attorneys, and the court, having considered and being now fully advised, finds the issues for the plaintiff and assesses its damages at the sum of forty-two thousand four hundred dollars.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant said sum of forty-two thousand four hundred dollars, its damages so as aforesaid assessed, together with its costs and charges in this behalf expended, taxed at the sum of twenty-eight dollars and twenty cents, and that execution issue therefor.

NORTHERN DISTRICT OF ILLINOIS, ss:

I, William H. Bradley, clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be true and complete copies of the motion filed January eighth, 1887, of the order entered of record January eighth, 1887, and of the judgment entered of record July twenty-eighth, 1883, in said court, in the cause wherein The Pittsburgh Bessemer Steel Company, Limited, is the plaintiff and Francis E. Hinckley is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this fifteenth day of February, 1887.

[SEAL.] WM. H. BRADLEY, *Clerk*.

In the Circuit Court of the United States for the Northern District of Illinois.

PITTSBURGH BESSEMER STEEL COMPANY
vs.
FRANCIS E. HINCKLEY. } 18033. Assumpsit.

It is hereby stipulated and agreed that the above-entitled cause may be submitted to the court for trial and tried by the court without the intervention of jury, a jury being hereby expressly waived.

Chicago, May 19th, 1883.

JEWETT, NORTON & LARNED,
Att'ys for Pl'tf.

W. C. GOUDY, *For Def't.*

Endorsed: Filed May 19, 1883. Wm. H. Bradley.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the stipulation filed in said court on the 19th day of May, A. D. 1883, in the cause wherein Pittsburgh Bessemer Steel Company is the plaintiff and Francis E. Hinckley is the defendant, as the same appears from the original thereof now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 18th day of February, A. D. 1887.

[Seal of Circuit Court U. S., Northern Dist. of Illinois, 1855.]

WM. H. BRADLEY, *Clerk.*

[Endorsed:] Supreme Court U. S. October term, 1886. No. 188. Francis E. Hinckley, P. E., *vs.* The Pittsburgh Bessemer Steel Co. Certified copy of a stipulation filed in the C. C. U. S. N. D. Ills., May 1883, waiving jury.

[Stamped:] Office Supreme Court U. S. Filed Apr. 4, 1887. James H. McKenney, clerk.

121-264

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 188.

FRANCIS E. HINCKLEY,
Plaintiff in Error,

vs.

THE PITTSBURGH BESSEMER STEEL COMPANY (LIMITED),
Defendant in Error.

Error to the Circuit Court of the United States, Northern District of Illinois.

Brief and Argument for Plaintiff in Error.

THOMAS S. McCLELLAND,

Counsel for Plaintiff in Error.

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 95-97 WASHINGTON ST.
1886.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 188.

FRANCIS E. HINCKLEY,
Plaintiff in Error,

vs.

THE PITTSBURGH BESSEMER STEEL COMPANY (LIMITED),
Defendant in Error.

Error to the Circuit Court of the United States, Northern District of Illinois.

Brief and Argument for Plaintiff in Error.

FACTS AND BRIEF OF THE EVIDENCE.

On February 18, 1882, the Pittsburgh Bessemer Steel Company entered into a written contract to manufacture and deliver to Francis E. Hinckley, at Chicago, Illinois, six thousand gross tons of first quality Bessemer steel rails, to weigh fifty-two (52) pounds to the yard, to be rolled true and smooth to pattern No. 5, to be furnished by the Steel Company.

The rails were to be subject to inspection, well-straight-

ened, free from flaws and drilled as directed. Ninety *per cent.* were to be in thirty (30) feet lengths and not over. Ten *per cent.* to be shorter, diminishing by one foot difference, but no rail was to be less than twenty-four (24) feet in length.

Second quality rails and an excess of shorts might be shipped at a discount of ten (10) *per cent.*, provided they were marked and did not exceed five (5) *per cent.* of each month's shipment.

Rails were to be delivered as follows:

One thousand tons in May, 1882, and twenty-five hundred tons *per* month after July 1, 1882, until finished.

Price to be $58 *per* ton of 2,240 pounds, of finished steel rails, ex. ship. or f. o. b. cars at Chicago, seller's option.

Terms: Cash on delivery of inspector's certificate for each 500 tons as fast as delivered.

Rails to be inspected at mills as fast as completed and ready for shipment.

Purchaser reserved the right to have one-half of the order fifty-six (56) pounds *per* yard, pattern 4, of the Steel Company, on giving thirty (30) day's notice of his intention before the time for delivery. (*Printed Record, page 14.*)

The rails were never manufactured, because of the alleged refusal of the plaintiff in error to give drilling directions, and to agree to accept the rails after they should be made; and this suit was brought by defendant in error, to recover damages for breach of the contract.

On March 29, 1882, the company's agent, who negotiated the sale, wrote Mr. Hinckley that the company was badly crowded and asked leave to turn over to him 1,200 tons 52-lb rails in stock, drilled with $\frac{7}{8}$ inch holes, $2\frac{1}{2}$ and $7\frac{1}{2}$ inches from end of rail. (*Printed Record, p. 15.*)

Mr. Hinckley declined to accept these rails on hand on account of May delivery, because they were not drilled to suit the plates which were on the old track, where the 1,000 tons May delivery were to be used, and indicated a willingness to accept them on account of the new track. (*Record, p. 16.*)

On April 3, 1882, Odell, the company's agent, wrote Mr. Hinckley for drilling directions covering the first 1,000 tons.

On April 29 he repeated the request, and asked permission to roll 1,300, instead of 1,000 tons.

On April 24 Mr. Hinckley wrote Mr. Odell, asking him to delay the May delivery of rails until later in the season, alleging that he had been delayed in his operations and could not tell when he would be ready to use the rails.

On the same day Odell wrote Hinckley to the effect that he must have drilling directions at once, and on the 26th of April Mr. Odell wrote Mr. Hinckley that any delay would cause great inconvenience, and that he could only refer the matter to the mill. (*Record, p. 17.*)

On April 28th Odell again called for drilling directions, saying that arrangements had been made to commence on the rails May 15, and also asked when the rails would be accepted in case they should be manufactured and put in stock to await shipment, to which Hinckley replied May 1st that he could not give directions for drilling, nor accept the rails if made, and requested the company to let the matter rest and to fill other contracts.

On May 13th the company itself telegraphed Mr. Hinckley for drilling directions, and was answered on same day by telegraph that he could not do so. (*Record, p. 18.*)

June 12th the company wrote Hinckley asking when

he could take the rails, and was answered, June 15th, that it was doubtful if he could take them that season.

June 23d the company manifested its readiness to proceed with the work, and asked for patterns and specifications, to which Mr. Hinckley wrote on the 26th, asking for time in which to pay for rails, as condition for taking them.

This was declined, and on August 30, 1882; the company wrote Mr. Hinckley advising him that the time for executing the contract had expired, and requested an answer whether or not Mr. Hinckley expected to take the rails, and closed by asking Mr. Hinckley to meet the Board at Pittsburgh, to which Mr. H. replied that his engagements would not permit his so doing. (*Record, p. 20.*)

The foregoing embraced all the facts, as exhibited by the written contract and correspondence by mail and telegraph.

At the trial of the cause, James S. Norton, a witness for the defendant in error, testified that on Sept. 15, 1882, after expiration of the contract, he served a written notice on Mr. Hinckley demanding drilling directions and offering to carry out the contract, at which time Mr. Hinckley expressed himself as under no obligations to give drilling directions, and that he was not bound to take the rails. (*Record, p. 20.*)

C. H. Odell, the broker who made the sale of the rails, testified that in the summer of 1882 Mr. Hinckley excused himself from taking the rails under his contract, because of his inability to procure funds to prosecute his railroad enterprise, and that the contract might be regarded as canceled.

That if the company would sell the rails on credit, and take collateral security, he (Hinckley) would enter into a new agreement and take the rails. That he only acted

as salesman for the Steel Company, and had no authority to bind it in any other respect. That all his communications were in writing. That he kept the company fully advised of his correspondence with Mr. Hinckley, but his letters and telegrams were in New York. His whole authority was embodied in the correspondence.

H. P. Smith, superintendent of the company, testified that Odell negotiated this sale under special instructions. That Odell had no general authority to act for the company.

Against the objections of the plaintiff in error, the witness was asked if the company was advised of the correspondence read in evidence, and of what Odell was doing, saying and asking on behalf of the company, and of Odell's correspondence and actions with regard to the sale and delivery of the rails, and if Odell's acts were approved by the witness, as manager of the company, and that he answered in the affirmative; to which the plaintiff in error excepted, on the ground that Odell's intercourse with Smith and the company was in writing, and the correspondence should have been produced.

Witness also testified that in May and June, 1882, he asked Hinckley to give drilling directions and state when he would take the rails, and was answered that the rails could not be taken in May; nor could the buyer say when he could take them, nor did he know how he wanted the rails drilled.

That later he told Mr. Hinckley material had been purchased, and if drilling directions were not given the mill would have to stop, when Mr. Hinckley again said he could not receive the rails, or tell when he could.

The witness was asked why the rails were not delivered, and he replied, " Because we could not induce him to say

" that he would receive them or give us drilling directions " to enable us to roll them." To both question and answer plaintiff in error objected, but the court overruled the objections, and exceptions were duly taken.

The witness was asked to state the elements of costs for rolling the rails, in detail, to which plaintiff in error objected; but the court overruled the objection, and exceptions were taken; and in answer the witness produced a memorandum taken from the books of the company, showing the cost of manufacturing one ton in August, 1882. He was asked by the company's attorney to testify as to the items shown on the memorandum, which was objected to; but the court overruled the objection, and admitted the memorandum in evidence.

The witness then further testified that he did not know the market price of steel rails in Chicago or Pittsburgh in either the months of May, July or August, 1882; nor could he tell with reference to the books of the company, but that he knew the market price in Pittsburgh was something less then the price named in the contract.

On cross-examination he testified, that in his conversations with Hinckley he learned the first thousand tons 52-pound rails were to relay old track; and that Hinckley wanted 56-pound rails for remainder; but nothing said specially of the two quantities, with reference to the deliveries during the several months. That there was no agreement with Hinckley to delay executing the order, and no waiver of time for delivery. That the mill was closed for about three weeks in July.

The witness was then re-examined by the attorney for defendant in error, and by questions and answers, to both of which the plaintiff in error excepted, he was allowed by the court to state the cost of manufacturing the rails per

ton, and delivering the same in Chicago, basing his statements upon the written memoranda, which he had produced, and which had been written out by the bookkeeper of the company, and which showed the cost of manufacturing one ton. This memoranda was dictated to the bookkeeper by the witness, from a pencil memoranda in possession of the witness.

On re-cross examination, the witness said that the memoranda was not made up from any particular date, but from the records of the company running through a series of months, probably four or five, and was a general average. That no rails were rolled for Hinckley under the contract. That at time the contract was made with Hinckley, the company had other contracts for rolling rails. That materal was purchased in advance for filling orders, and material for different orders was filed together, and there was no way of distinguishing what part of the material was for filling Hinckley's order and what for other orders. He could not give quantity of material purchased nor dates, without reference to books of the company. That the capacity of the mill was from 6,000 to 7,000 tons a month. Prices for rails decreased from date of contract to August 30th following, and material also decreased, but not quite so much. That material bought to fill Hinckley's contract was manufactured into rails for other parties, and sold at a lower rate. Four thousand tons were made and sold with special reference to filling up the date at which Hinckley said he could not receive the rails. Four thousand tons were sold in Michigan and delivered there at $54.40 or $54.60; but these were thirty-five pound rails, and cost more to manufacture them, and the company's profits were less. (*Record, pp. 21 to 26.*)

The plaintiff in error introduced L. S. Bonner, who

testified that the market price for steel rails in Chicago during May, 1882, was $54 per ton; in July, $52; that it cost to manufacture such rails in Chicago, during the months of May, July and August, $55 per ton.

R. R. Jones, superintendent of the Union Iron and Steel Co., of Chicago, testified that there was a variance in drilling holes for fish-plates, as to distance from ends of rails, and if not done when the rails were straightened it would cost about twenty to twenty-five cents extra per ton to take them down from piles and drill, but that difference in drilling did not affect the durability, strength or quality of the rail.

L. T. Moore, a civil engineer for the I. C. R. R. Co., testified that the difference in drilling rails consisted in the distance from the ends of the rails the holes were made for attaching the fish-plates. If a mistake was made in drilling the holes, other fish-plates would have to be procured to correspond with the holes.

H. C. Draper testified to the same effect.

Plaintiff in error, in his own behalf, testified that the 52-pound rails were to be used on the old road and to be No. 5 pattern, and that it would take about 1,000 tons. The 56-pound rails were to be used on the new road, which would require the 5,000 tons. That the price of rails — 52-pound — in Chicago, in May, 1882, was $54 to $55.

Thos. Jordan, an engineer for the C., B. & Q. R. R. Co., testified that plans were usually made for rails to be drilled to correspond with fish-plates to be used. That his company usually gave directions for drilling before the rails were rolled. For repairing old lines it is important to have drilling done the same as in old rails.

H. P. Smith, recalled, said freight on Michigan rails was $4 to Port Huron.

H. Duval testified to price of pig iron in Chicago from March to September, 1882. Price varied from $29.50 to $25.75. In August it was $26. Did not know price in Pittsburgh during same season.

F. K. Boos, iron broker, testified that standard 52-pound rails are worth $5,000 to a mile of road, and fish-plates, $130 per mile. If drilling did not fit fish-plates in hand, new ones must be bought. That if he ordered rails, he would give drilling directions with the order. That there was no difference between market price of rails already drilled and rails drilled according to instructions.

Mr. Hinckley said the Chicago, Pekin & S. W. R. R., being witness' road, used three or four different drillings. (*Record, pp. 26–8.*)

Richard C. Hannah, on behalf of defendant in error, said that the cost of manufacturing rails in Chicago during 1882 was $50 per ton, and price of same rails made at Pittsburgh and delivered in Chicago would be about same price.

That market price in Chicago for rails in May, 1882, was $54 to 55. In July, $55 or more. (*Record, p. 28.*)

Upon the foregoing evidence the court below, who heard the case without a jury, found the issues for defendant in error and assessed its damages at $42,400, and directed judgment to be entered for that sum, which was done.

The court rendered an opinion in the cause, which is incorporated in the record from pages 9 to 13, and also filed special findings, pages 28 to 30.

ASSIGNMENT OF ERRORS.

First — The court erred in admitting improper evidence.

Second — The court erred in not holding that, before any recovery was had, defendant in error should have manufactured and tendered the rails to plaintiff in error, and, upon his refusal to accept and pay for the same, to have sold the same for the best price it could procure in Chicago, the point of delivery, and held defendant in error responsible for the difference between what the rails might have brought and the contract price.

Third—The special findings are not sustained by the evidence.

Fourth—The damages found by the court are not sustained by the special findings.

Fifth—The court erred in finding for defendant in error and in not finding for plaintiff in error.

Sixth—The court erred in not allowing for wear and tear of machinery, risks incurred in manufacturing the goods and actual cost of freight during the months the goods were to have been delivered, and interest on the "plant" or capital invested by defendant in error in its foundry.

Seventh—Assuming, as matter of law, that the court did not err in the measure of damages, the finding and judgment is excessive. Upon the theory adopted by the court the judgment should only have been $41,600, instead of $42,400, an error of $800.

BRIEF.

1.

The giving of drilling directions, mentioned in the contract, as an option reserved to plaintiff in error, was not a condition precedent to a performance of the contract on the part of the defendant in error; and its failure to manufacture and deliver the goods provided for by the contract was such a breach of the contract by it that it is barred from maintaining this action.

Palm et al. v. *The Ohio & Miss. R. R. Co.*, 18 Ill. 217.

County of Christian v. *Overholt et al.*, Ibid. 223.

Even if the direction were in the nature of a condition precedent, plaintiff in error, by his letter of April 1, 1882, to defendant in error, substantially waived his right to give such directions as to the 5,000 tons (page 16), and, *pro tanto*, no action would lie in this case.

2.

If there is a cause of action against plaintiff in error, the measure of damages should be the difference between the contract price and the market price at the time and place of delivery, and not the difference between the contract price and the cost of manufacturing and delivering the goods, as found by the lower court.

Pollen et al. v. *Leroy, et al.*, 3 Tiffany, N. Y. 549.

2 Sutherland on Damages, 359, and cases cited thereunder.

Masterton et al. v. *Mayor of Brooklyn*, 7 Hill, 61.
2 Stark. Ev. 1201 (7th Am. ed.)
Boorman v. *Nash*, 9 Barn. & Cress. 145.
Story v. *N. Y. & H. R. R. Co.*, 6 N. Y. 85.
McLean v. *Dunn*, 4 Bing. 722.
Leigh v. *Patterson*, 8 Taunt. 540.
Gainsford v. *Carroll*, 2 Barn. & Cress. 624.

The contract was one and indivisible, notwithstanding the goods were to have been delivered by installments, and if any breach of the contract occurred, occasioned by the non-feasance of Hinckley, it was when he failed to furnish drilling directions for the May delivery of 1,000 tons, and the measure of damages should have been fixed at the difference between the market and contract prices in that month.

Masterton v. *The Mayor, etc.*, 7 Hill, 71.

In an action by a vendee against a vendor, for a breach in not delivering the article sold, the measure of damages is the market price at the time of the breach.

Marsh v. *McPherson*, 105 U. S. 709.
Hopkins v. *Lee*, 6 Wheat. 109.
Douglass v. *McAllister*, 3 Cranch, 298.
Shepherd v. *Hampton*, 3 Wheat. 200.
Masterton v. *Mayor*, 7 Hill, 74, and cases cited.

In an action against a vendee of real estate for a breach of contract to take and pay for land, the measure of damages is the difference between the contract price and the

price for which the land could have been sold at the time of the breach.

Old Colony R. R. Co. v. *Evans*, 6 Gray, 72 Mass. 25.

Griswold v. *Sabine*, 51 N. H. 167.

The defendant in error was bound, both in law and good morals, to exercise due diligence to protect itself, and thereby inflict the least possible damages on the plaintiff in error, even if the latter was guilty of a breach of his contract. It devolved upon the former to manufacture the raw material, which it claimed to have purchased for the rails in question, into standard 52 and 56-pound rails, and tendered them at Chicago, the place of delivery, and if not accepted, to have sold them at the current market price, which seems to have been about $55 per ton, and by so doing reduced Hinckley's liability to $3 per ton at the most.

Shannon v. *Comstock*, 21 Wendell, 457.

Hecksher v. *McCrea*, 24 Wendell, 309, and cases cited.

Hamilton v. *McPherson*, 28 N. Y. 76, and cases cited.

3.

The finding and judgment in this case being $800 in excess of the actual amount due, on the theory and basis of computation adopted by the court below, the case should be reversed and remanded, for the reason that the judgment being an entirety, and not made up of distinct and separate items, cannot be affirmed in part and reversed in part, but should be wholly reversed, with directions, providing this court shall not find other error in the record.

4.

Where a witness testifies regarding written entries in a book, or a writing of any kind, and he produces extracts of the same, such extracts cannot be admitted in evidence, nor can the witness use the extracts for the purpose of refreshing his memory.

1 Greenleaf on Evidence, sec. 437.

Doe v. *Perkins*, 3 Term R. 749.

Merrill v. *The Ithaca & Oswego R. R. Co.*, 16 Wendell, 586, and cases cited.

And this court will look into the record to ascertain if such error was committed.

Martinton v. *Fairbanks*, 112 U. S. 670, and cases cited.

Argument.

May it please the Court:

The plaintiff in error alleges four distinct grounds upon which he relies for a reversal in this case:

First—The defendant in error not having manufactured or tendered the rails, on account of which it sues, within the time limited by the contract, it was in default, and cannot shift the burden upon the plaintiff in error by setting up that the giving of drilling instructions, reserved in the contract, was a condition precedent to a performance of the contract on its part, that reservation being a right which plaintiff in error could exercise or waive at his option, and a failure on his part to give such directions when requested was, in fact, a waiver. As to the July and August deliveries of 5,000 tons, Hinckley's letter to the Steel Company dated April 1, 1882, was an express waiver.

Second—Even if this were not the legal construction to be given the contract, and assuming that defendant in error was not bound to proceed in the execution of its part of the contract until such drilling directions were given, thus treating directions as a condition precedent, and, in default by plaintiff in error to give the same within the time fixed by the contract for a complete performance, a cause of action rose against him, then the court below erred in settling the rule of damages at the gross profits had it carried out the contract, and should only have allowed the difference between the market price of the same weight rail in the Chicago market and the price to be paid under the contract, instead of allowing the full gross profits, as found by the court, less the $1.60 per ton allowed on the 4,000 tons 32-lb. rail, made and sold in Michigan, in total disregard of the wear and tear of machinery incident upon manufacturing the rails, risk in making and shipping, and other contingencies consequent upon filling a contract of this character and magnitude.

Third—If this court should hold with the court below, as matter of law, that the drilling directions in the contract were a condition precedent to a performance of the contract by the Steel Company, and that the failure of the plaintiff in error to give the same within the time limited for a complete fulfillment of the contract, and after demand made by the Steel Company, and if it shall also hold that the measure of damages fixed by the trial court was correct in law, then we find that an error was committed, and that the damages are too great by $800. On the theory of the court below the gross profits to the Steel Company, had it carried out the contract, would have been $48,000, $8 per ton on 6,000 tons of rails. It appearing that the Steel Company used a part of the raw material bought to

fill this contract in manufacturing 4,000 tons of 32-pound rails, which it sold in Michigan, at $1.60 per ton profit, or $6,400 in the aggregate, the court below gave credit for that amount, and this sum, deducted from $48,000, would leave $41,600, instead of $42,400, as found by the court, and upon which it entered judgment.

Fourth—By permitting a witness to testify regarding entries made in regular books of account kept for the purpose of such entries, from mere memoranda abstracted from such original books of entry, as in this case, drawn off by another person than the witness himself, thereby depriving the other side of an inspection of the books and the benefit of a cross-examination from the same, was the denial of a right which was and is elementary in its nature, and without which one of the most cherished safeguards in the trial of a cause, guaranteed by a long and established practice, was taken away from the plaintiff in error. The original books of entry ought to have been produced and the benefit of an inspection given to plaintiff in error, as well as the privilege of cross-examining the witness from the books themselves. So also was there error in allowing witnesses to testify as to the contents of correspondence without laying a proper foundation therefor.

I.

The plaintiff in error was not in default. The reservation of the right to give drilling directions was not a condition precedent; and upon Hinckley's failure to furnish these directions the Steel Company could and ought to have manufactured a rail of the required weight and length, drilled according to some common standard for fish-plates, ordinarily used, and have tendered such rails, and, if refused, have sold the same at the current market price in Chicago,

the place of delivery, which was $55 per ton, and held Hinckley for the difference between that figure and the contract price of $58 per ton. Failing to do this, and electing to fill other contracts, the company were in default, and have no right or cause of action.

If any possible exception to this proposition can be found in the record, it relates solely to the 1,000 tons which were to have been rolled in May, and to be used in repairing old track which was furnished with fish-plates of a certain standard or style, and a rail drilled according to another style would have necessitated throwing away the old fish-plates and the purchase of new ones. But was that any affair of the Steel Company? A 52-pound rail seems to have been a standard weight, and this was the weight settled upon for the 1,000 tons; and it is reasonable that, upon refusal to give drilling directions for this 1,000 tons, a tender of that quantity drilled on any general standard would have been incumbent upon the company, and if not accepted and paid for, the same could have been sold in open market, and Mr. Hinckley would have been liable for any losses incurred.

As to the remaining 5,000 tons, the whole record discloses the fact that so far as the company was concerned no drilling directions were required and none asked until late in the season. These rails were for new road, and at most it was a matter of taste as to how they should be drilled. As to that 5,000 tons it seems no excuse existed for the company not carrying out the contract on its part by manufacturing and tendering the rails. Especially when the market was such that a fifty-two pound or a fifty-six pound rail could have been readily sold at an advance over the cost of manufacturing, which, *pro tanto*, would have reduced plaintiff in error's liability, which I

hereafter argue was the legal duty devolving upon defendant in error.

The conclusion of law arrived at by the court below was that the giving of these drilling directions by Hinckley was a *condition precedent* to any act on the part of the Steel Company, and if this court shall reach the same conclusion, then there is no escape from the fact that Hinckley was in default, and was liable for some damages. The conclusion, is one of law and reviewable here. This court will observe that the trial court did not find that drilling directions were *necessary*, but "that it was *usual* and *customary*" to give drilling directions. If in the nature of things the company could not have gone on with the contract without these directions, or if it was in the contemplation of the parties to the contract that the methods of drilling was a necessary attribute to the rails, then I concede that the giving of these directions was a *condition precedent*. The contract provides that the rails were "*to be drilled as may be directed.*" That was clearly an option reserved by Hinckley; but if he did not see fit to avail himself of it, it would not have lain in his mouth to have said he would not accept rails drilled after some common standard, because he had not directed such drilling, when the company, on its part, had been forced to that resort in order to carry out its part of the contract.

The law on this point is as well set forth by Judge CATON in *Palmer et al. v. The O. & M. R. R. Co.*, 18 Ill. 219, as in any case I have found. He says: "I have "examined all the authorities referred to by counsel, and "have made diligent search myself, but have found no "case where the plaintiff has been allowed to recover for "losses sustained by not being permitted to complete the "contract, unless he was prevented from going on with his

" work, by the positive affirmative act of the other party,
" or where the other party has neglected to do some act,
" without which the plaintiff could not, in the nature of
" things, go on with his contract, as when he refused to
" furnish a place whereon to erect a building, or to furnish
" material which, by the contract, was to be put in the
" works and which was to be provided by him. In such a
" case the act agreed to be done is clearly a condition pre-
" cedent and indispensable to enable the other party to go
" on. Where the act which the defendant was bound to
" do is, by the terms of the contract, made a condition
" precedent to the performance by the plaintiff, either in
" the nature of things, or evidently in the contemplation
" of the parties at the time the contract was entered into,
" then the failure to do the act does, of itself, prevent the
" other party from performing as much as if he were for-
" bidden to perform it."

That was a case where plaintiffs contracted to build sixteen locomotives at a stipulated price, to be paid for as the work progressed. The plaintiff had constructed five, and had purchased material for the rest; but defendant failing to pay for one of the locomotives delivered, as agreed, plaintiffs elected to rescind the contract and sue for the prospective profits which they assumed would have been realized if they had constructed the remaining engines; and the court held that the action could not be maintained, for the reason that the payments as deliveries were made, were not conditions precedent to the carrying out of the builder's contract to construct the other locomotives. If hardship could enter into or become an element for consideration in a legal proposition, that case appealed much stronger to the discretion of a court than the case at bar, for in that case the things to be manufactured could hardly

be treated as articles of merchandise, whereas it may be conceded that steel rails for the use of railroads are as much articles of merchandise as any manufactured article to be found on the market.

The same rule of law is laid down by Judge CATON in the *County of Christian* v. *Overholt et al.*, 18 Ill. 223, and serves as another example to illustrate the proposition for which I am contending.

If, then, the giving of drilling directions was not a condition precedent to manufacturing the rails, the Steel Company could not recover anything.

Palmer et al. v. *The Ohio & Miss. R. R. Co.*, 18 Ill. 217.

Christian County v. *Overholt et al.*, Ibid, 223.

The company was informed by Hinckley in his letter of April 1st, that the drilling of the 5,000 tons was not material, inasmuch as that part of the 6,000 tons was for new road, for which he would have to furnish fish-plates, and he could as well buy fish-plates to fit any standard drilled rail, as to first buy fish-plates and then have the rails drilled to correspond.

It is manifest that Hinckley, as early as April 1st, waived his right, or option, to give drilling directions for the 5,000 tons, and the company had notice of it. As the court below found that these directions constituted a condition precedent, this court will look into the record for the purpose of ascertaining if there was a waiver, so as to throw the burden upon defendant in error. The finding that Hinckley refused to accept and pay for the rails cannot for a moment be considered in this connection, or form the basis for a judgment in the case. The receipt and payment was consequent upon the manufacture and

delivery. That was made so by the terms of the contract, and it is well settled in law that an article sold must be made and tendered before its receipt and payment can be demanded; and defendant in error cannot be heard to say that it declined to perform its part of the contract, "because," as the witness Smith says, "we could not induce him to say that he would receive them."

Hinckley's obligation to receive the rails was embodied in the contract, wherein he was bound to receive them, if tendered, and the record is void of a single word going to show that Hinckley *refused* to accept the rails at any time, except in the testimony of Mr. Norton, a witness, who testified that on Sept. 15, 1882, some days *after* the expiration of the contract, he had a conversation with Mr. Hinckley, at which Hinckley *then* declined to accept the rails. This is fully sustained by the special findings, which must govern.

I submit that as to the 5,000 tons the breach of the contract was with the Steel Company. It had its contract, binding on plaintiff in error, who must have been assumed to have been solvent, and had it manufactured the 5,000 tons of rails, and tendered the same, it would have had a good cause of action for the full purchase price, had the vendee refused to accept; but no expressions of inability to receive the rails could be legally construed into a *refusal*. To constitute a *refusal*, words must be used which convey an intention *not to accept*, and without conditions. The court erred when it found, from the facts, that the company was excused from making the rails. That was and is a question of law, reviewable in this court.

II.

Steel rails, used in constructing railroads, being general articles of merchandise, and having a market value, the

true measure of damages in this case was the difference between such market price at the time of the breach, when ascertained, and the price provided in the contract, and not the difference between the contract price and the cost of manufacturing and delivering the rails, as found and allowed by the court below.

In *Pollen v. Leroy*, 3 Tiffany (N. Y.), 556, the court said: "The difference between the agreed price of an "article and its market value at the time of delivery is the "actual damage sustained by a vendor upon the refusal by "a vendee to accept the property sold, and the vendor may "ascertain or liquidate this amount by resale, taking all "proper measures to make as fair and favorable a sale as "possible."

In the same case the court says the vendor may sell the goods and recover the deficiency, or he may abandon the goods and sue for the price, and that "this is the rule "in all sales and in respect to property of every descrip-"tion."

The principles involved in this branch of the case are treated at length in 2 Sutherland on Damages, chapter 4, page 347, *et seq.* At page 359 the author says: "An "executory agreement, which requires a subsequent ac-"ceptance of the property by the buyer to consummate "the sale, does not become a complete bargain and sale, "so as to vest the title in him, if he refuses to take the "goods. In such case the vendor is entitled to recover "damages only to the extent of his actual injury from the "failure of the vendee to fulfill his contract, which is, or-"dinarily, the difference between the contract price and "the market value at the time and place of the breach, "with interest. This may be ascertained and fixed by a

"resale within a reasonable time, and after notice to the "vendee of the vendor's intention to resell, taking all "proper measures to secure as fair and favorable sale as "possible."

Authorities illustrating the text are so fully collated in 2 Sutherland on Damages, at pages 359 *et seq.*, where the general principles of law governing the case are stated, that it seems useless to cite them at length here.

It will be observed that it is only sought to apply the rule of law here invoked to cases where the article in controversy has a known or ascertainable market value—not such cases as *U. S.* v. *Speed*, 8 Wall. 77, and other cases in which there was and could be no market value. The distinction is manifest; and applying the rule in this case I have assumed that the court will take judicial notice that steel rails for use in constructing railroads are merchantable articles, having a market price, a fact known, I take it, everywhere, to all persons, and proof of the fact is disclosed in the record in this case, although not incorporated in the special findings.

The question is one of indemnity, coupled with a due exercise of diligence on the part of him who claims this indemnity. The rules of law governing breaches of contract, in cases *ex contractu*, is as well presented in *Masterton* v. *Mayor*, 7 Hill, 61, as in any case I have found; and such rules seem to be as follows: If the labor and material to be furnished have no market value, then the difference in cost of manufacture and the contract price is the true measure of damage. If the article has a market value, and it has depreciated, the vendor's measure of damage is the difference between the contract price and the decreased market price. If the goods have appreciated, then the vendor, by selling to others in the market at the

full contract price, or for the increased price, would sustain no substantial damages. In either case, his indemnity would be full and complete by such sale. He would lose nothing; he would not be damaged.

As to the 1,000 tons for May delivery, the measure of damages would either be the difference between the cost of manufacture and freight from Pittsburgh to Chicago during that month and the contract price; or it would be the difference between the value of the manufactured goods in the Chicago market, the point of delivery, in that month, and the contract price.

The same would be true regarding the July and August deliveries. But there is no evidence in the case tending to show what it would have cost to manufacture the goods at Pittsburgh and deliver them in Chicago during any one of those months. There is evidence tending to show that this grade of rails were worth during the summer of 1882 about $55 per ton. If I am correct as to the measure of damages, to wit: the difference between the market value in Chicago and the price agreed to be paid, then it would have been $3 per ton on $18,000, as the total damages under the contract. Could the defendant in error have manufactured the rails and delivered them in Chicago at $50 per ton, it was in duty bound to do so, and plaintiff in error failing or refusing to take them, the rails would have sold at the market quotations, at $55 per ton, whereby defendant in error would have realized a *net* profit of $5 per ton, and plaintiff in error's liability would have been diminished in a like amount.

It does not lie with one party to inflict a punishment upon another for a violation of a contract. At most the injured one can only claim reparation, or ask to be made whole, and he must make it appear that he has not been

guilty of laches himself. He should so act that his adversary is mulcted in the least possible damages.

This rule of law is clearly set forth in the cases of *Shannon* v. *Comstock*, 21 Wendell, 457; *Heckscher* v. *McCrea*, 24 Wendell, 309, and *Hamilton* v. *McPherson*, 28 N. Y. 76, and the numerous citations in those authorities.

The capacity of the defendant in error's mill could not exceed 7,000 tons *per* month.

It is clear that the mill was running full during the time this contract was in existence, except some three weeks in July. The delivery for that month was to have been 2,500 tons, which could have been manufactured in eleven days and a half, so that at most defendant in error's mill was only closed for that length of time on account of any default on the part of Hinckley, and there is no evidence to show what damages were sustained by the Steel Company consequent upon that stoppage.

If the mill was running during the months of May and August at its full capacity, and defendant in error made substantially the profits that it would have made had it carried out the contract with plaintiff in error, then no damage could have resulted to it.

It cannot be permitted to this company to run its mill at a profit for one customer, and exact the same profits for work it might have done, within the same time, under another contract; and it was the duty of the company, upon refusal of Hinckley to take the rails or furnish drilling directions, to fill other contracts, make its profits, and thereby diminish the damages for which Hinckley might have been liable under this contract.

The rule on this subject is correctly set forth by

MELLEN, C. J., in *Miller* v. *Mariners' Church*, 3 Greenl. 51, 55, 56, when he says:

"In general, the delinquent party is holden to make "good the loss occasioned by the delinquency. But his "liability is limited to direct damages, which, according to "the nature of the subject, may be contemplated or pre-"sumed to result from his failure.

"The purchaser of perishable goods at auction fails "to complete his contract. What shall be done? Shall "the auctioneer leave the goods to perish, and throw the "entire loss upon the purchaser? That would be to aggra-"vate it unreasonably and unnecessarily. It is his duty "to sell them a second time, and if they bring less he may "recover the difference, with commissions and other ex-"penses of re-sale, from the purchaser. If the party en-"titled to the benefit of the contract can protect himself "from the loss arising from a breach, at a reasonable ex-"pense, or with reasonable exertions, he fails to do his "social duty if he omit to do so, regardless of the increased "amount of damages for which he may intend to hold the "other contracting party liable."

Mr. Justice COWEN, in case *Sherman* v. *Comstock*, 21 Wend. 461, in commenting upon the rule of law as laid down by Judge MELLEN, says: "The reason and justice "of these remarks are open to continual illustration in the "affairs of men. A mason is engaged to work for a "month, and tenders himself and offers to perform, but "his hirer declines the service. The next day the laborer "is employed at equal wages elsewhere for a month. "Clearly his loss is but one day, and it is his duty to seek "other employment."

The same doctrine is recognized in *Heckshcr* v.

McCrea, 24 Wend. 309; *Clark* v. *Marsciglia*, 1 Denio, 317; *Spencer* v. *Halstead*, *Ibid.* 606, and *Locker* v. *Damon*, 17 Pick. 284.

Applying the rule to the case at bar, the defendant in error should only have recovered its real, absolute damages, and these damages should have been shown by competent and adequate proofs.

To allow it the enormous sum of $42,400, as net profits on about twenty-five days' employment for the mill, without deducting anything for the various contingencies which were liable to arise in the manufacture and transportation of the rails, when it appears that the mill was in successful operation during the same period, is inflicting such a punishment upon plaintiff in error as to amount to a personal wrong.

There is nothing in the record nor in the special findings to show what the earnings or profits of this mill were during the four months ending Aug. 31, 1882. In order to warrant a finding and judgment for that sum, there should have been a finding, based on competent evidence, that the Steel Company in fact sustained an actual loss of the amount found by reason of the alleged breach of the contract.

Nor is there anything in the evidence or findings of the court to show that the Steel Company made any effort to protect Hinckley, beyond the fact that it run its mill at its full capacity during the whole time from May 1 to Sept. 1, 1882, with an intermission of some three weeks in July, and that out of the material it had provided to fill the Hinckley contract it manufactured some 4,000 tons of rails of a different and more costly pattern, and shipped them to Michigan at a profit of only $1.60 per ton; from which the court found that the company had sustained damages,

as to that 4,000 tons, in the sum of $8 per ton, less this $1.60 per ton profit on the Michigan rails. It was the legal duty of this company to have manufactured a standard rail of the kind contracted for by Hinckley, and have sold them in the Chicago market at the current market price, looking to Hinckley for the difference in loss, if any, instead of filling other orders for a lighter rail, and sold in a different market.

"The law, for wise reasons, imposes upon a party "subjected to injury from a breach of contract the active "duty of making reasonable exertions to render the injury "as light as possible. Public interest and sound morality "accord with the law in demanding this; and if the injured "party, through negligence or willfulness, allows the dam-"ages to be unnecessarily enhanced, the increased loss "justly falls upon him."

Hamilton v. *McPherson*, 28 N. Y. 76.

To illustrate the enormity of this judgment, and assuming that this company manufactured, during the months of May, June, July and August, 1882, the full amount of 7,000 tons per month, its gross manufacture during that period was 28,000 tons; and, assuming further, that its other contracts were of the same character as the Michigan contract, and it realized only $1.60 per ton profit on the whole, then its gross profits actually realized for the four months was only $44,800, while it claims, and has been allowed in addition thereto, the large sum of $42,400 against Hinckley for a failure to take and pay for the 6,000 tons, which would have occupied only some twenty-five days to manufacture, and on account of which it never built a fire or expended a single stroke of a hammer, nor incurred the least risk in manufacture or shipment, and suffered not one cent in the wear and tear of machinery

or damage to its "lay-out," which would have resulted inevitably, if these goods had been manufactured, and which was not taken into account at all by the learned judge who tried this case in the court below.

If the premises are correct in fact, we have presented the novel result of a manufacturer of steel rails, in the space of four months, and suffering a loss from natural wear and tear of machinery which had to be eventually made good out of the profits, and running all risks incident to manufacturing and shipping the class of goods in controversy, earning $44,800 profits out of an actual manufacture of 28,000 tons of steel rails; and within the same period being allowed a *net* profit of $42,400 on a contract for 6,000 tons of rails which were never manufactured, and on account of which no expenses were incurred beyond the purchase of some raw material, no labor performed and no risk taken; and the mill in constant operation all the while, except for a short time to enable its owners to do necessary repairs, or lack of work, and if the latter, it could only apply to the 2,500 tons to be delivered that month on the Hinckley contract.

It may be unfortunate that the record and findings do not disclose more in detail the facts regarding the purchase of this raw material—the pig iron and spiegel iron used in the manufacture of steel rails.

The evidence tended to show and the court so found, that the defendant in error did, upon procuring this contract from plaintiff in error, at once purchase pig iron for the manufacture of these rails. May be it did, but if so, it had one of two duties to perform: either to have resold that pig iron in open market when it foresaw that Hinckley was not going to have them use it in making his rails, and held him for the loss; or else they should have manu-

factured this pig iron into standard steel rails, shipped the same to Chicago, where there was a daily demand and a market, tendered them to the purchaser, and on his refusal to take and pay for the same, disposed of them at the current market rate, which was about $55 per ton, and have looked to the purchaser for the loss sustained, which would have been only about $3, and thereby have come within the purview of the law laid down by Judge SELDEN in *Hamilton* v. *McPherson*, *supra*, and inflicted upon its customer the least possible injury.

Apart from the rails necessary to repair old track, 1,000 tons or less, it was immaterial to Hinckley how the rails were drilled for fish-plates, as he wrote in his letter of April 1, 1882. These fish-plates were made standard sizes to fit standard rails, and so far as new track was concarned one style was as good as another.

The reservation by Hinckley of the right to give instructions regarding this drilling was not a condition precedent to the construction of the rails, except in so far as he might elect to avail himself of it. The Steel Company was not bound to wait beyond a reasonable time for such instructions, and if not given far enough in advance to enable them to have gotten out the rails and delivered them within the time fixed by the contract, they would have been justified in drilling the holes to a common standard for fish-plates in general use and tendering the same, and Hinckley would have been estopped from setting up the defense that they were not drilled to his liking; and such rails would have found ready sale in the Chicago market during that summer at $55 per ton, or only $3 less than the price to be paid by Mr. Hinckley.

The contract having been broken in May immediately upon Hinckley's failure to furnish drilling directions for the

1,000 tons, or that month's delivery, the measure of damages would have been the difference between $58 *per* ton and the market price in Chicago in the month of May, and could not have exceeded $18,000 on the entire contract; and if the court shall find that Hinckley was in default only as to giving drilling directions for the May delivery, then the damages would only be $3,000.

In *Masterton* v. *Mayor*, etc., 7 Hill, 71, the court announced the settled law in this language: "Where the "contract, as in this case, is broken before the arrival of "the time for full performance, and the opposite party "elects to consider it in that light, the market price on the "day of the breach is to govern in the assessment of dam- "ages. In other words, the damages are to be settled and "ascertained according to the existing state of the market "at the time the cause of action arose, and not at the time "fixed for full performance."

Further on the court says, page 72: "*If there was "a market value of the article in this case, the question "would be a simple one. As there is none, however, the "parties will be obliged to go into an inquiry as to the "actual cost of furnishing the article at the place of de- "livery.*"

Judge NELSON based his opinion upon *Boorman* v. *Nash*, 9 Barn. & Cress. 145, and other cases, cited on page 70.

If steel rails had advanced to $60 per ton, and the Steel Company had failed to make the rails, Mr. Hinckley could have gone upon the market and purchased the rails at the advanced price, and his measure of damages would have been the difference between what he would be obliged to pay and the contract price. This proposition will not

be controverted. The authorities are, I think, in harmony on this question.

Wherein does the difference consist? When the market declined, the defendant in error, by subjecting itself to all the contingencies of making the rails, could have sold them for the current market price, and its measure of damages would have been the difference between that price and the contract price. It will not be claimed that it would have cost the Steel Company any more to make the same grade of rail and sell it at $55 per ton, the current market price, than it would to sell at $58 per ton.

I call especial attention to *Masterton* v. *Mayor*, because the court below cites it as governing in this case, which seems to me to be a misapprehension, because the court, in *Masterton* v. *Mayor*, points out the fact that the article there in controversy had no *market value*.

If this court, in the present case, shall come to the conclusion that steel rails had no *market value* in Chicago in the summer of 1882, then I concede that the rule of damages fixed in the Masterton case must control here, contending, however, that in this case due allowances were *not* made for risk, etc., which ought to have been allowed in reduction of damages.

By the judgment rendered, the plaintiffs in the lower court were permitted to go on during that season filling other contracts and making their profits for materials actually furnished and labor actually performed, and at the same time accorded them profits upon labor and material neither performed nor furnished, upon a basis of the difference between the cost of manufacturing and delivering the goods and the price stipulated in the contract, relieved of all care and responsibility, or a due diligence to protect

its customer under the law, or regard for the rights of such customer.

This is not correct in law, nor is it sound in morals.

The business embarrassments of Mr. Hinckley may have led him into a breach of his contract, but that affords no justification to the defendants in error to inflict upon him an irreparable injury.

I am aware of the fact that the court below does not find that there was, in fact, a market price for steel rails in Chicago during the summer of 1882, but such was the evidence before the court, and if the measure of damages adopted by the court was wrong in law, this court, on review, will reverse, without inspecting the record and without regard to any results which would have followed from the adoption of the rule here insisted upon, to wit: The difference between the contract price and the market price at the time and place the goods were to have been delivered.

The court, as I said before, in this age of railroads, will take knowledge of the fact that rails are as much articles of commerce as any other manufactured article in general use.

There are cases like that of the *Philadelphia, Wilmington and Baltimore Railroad Co.* v. *Howard*, 13 How. 307, where the breach consists of an attempt on the part of a party for whom specified labor is to be performed to rescind the contract, as, for instance, a contract for the grading of a road-bed, which can have, in the nature of things, no market value. In such cases, the only possible way to arrive at the injury sustained by the contractor is to ascertain his profits had he been allowed to finish his contract; that is, the difference between the price stipulated to be paid and the cost of doing the work.

Even in a case of that kind, the injured party is not justified in lying idle and in not employing his time at the best profits he may be able, so as to reduce the actual damage to the lowest possible amount; nor would he be permitted to make equal profits out of other contracts performed within the time provided for performing the contract out of which he might claim damages for a breach, for this would be allowing him double profits, that is, he would be permitted to speculate on his adversary's misfortunes.

In the case before the court there ought to have been some accounting as to the volume of business done by the defendant in error during the time in which its contract with plaintiff in error was to have been fulfilled, as well as its profits arising from such business, with a view to ascertaining whether or not the defendant in error did not make quite as much profits by other contracts entered into and performed during that period, or, at least, to an extent which ought to materially diminish the damages allowed against the plaintiff in error.

The evidence on which this judgment is founded is not relieved from doubt. The court below found that the defendant in error, immediately after making the contract, purchased the necessary material for making the 6,000 tons of rails, and that the same declined between that time and September 1st. This finding was based upon the testimony of Mr. Smith, the superintendent of defendant in error. The depreciation seems to have been about $3 in the pig iron, which was the principal ingredient going into the rails. But it was also found by the court that 4,000 tons of the material had been consumed in making the rails which went to Port Huron, in Michigan; and it was further found that defendant in error's mill was in constant opera-

tion during that summer, except for a short time in July. As the defendant in error makes no pretense of having expended any labor in or about the Hinckley contract, would not its damages be limited to any loss it sustained by reason of this depreciation in the cost of pig iron? Under all the circumstances in this case, it seems that this company should be restricted to its *actual* damage, if any, sustained by this purchase of material, when that loss, or damage, can be ascertained.

Had the Steel Company in July and August purchased other material at the largely reduced price, and manufactured and delivered the 5,000 tons rails, which they could have drilled as they pleased, as Hinckley wrote in his letter of April 1st, they would have fully made up any loss sustained in the manufacture and sale of the rails in Michigan, as they could have sold the same at the market price of $55 per ton, and out of a cheaper raw material, and thereby have lessened their claim for damages against Hinckley; and this, as I have shown, they were in duty bound to do. Or, if Hinckley had accepted the 5,000 tons July and August deliveries at the coutract price, made from material bought at a reduced price, the Steel Company's net profits on the 5,000 tons would have made up for losses on the 1,000 tons, and the company will not be heard to say that Hinckley would not have accepted, because they never tendered the rails.

III.

On the theory adopted by the District Judge who tried the case, the damages and judgment thereon would have amounted to only $41,600. This may be readily ascertained by a computation, under the rule laid down by the court. As will appear from the record, the finding and judgment were $42,400. This was an entire

judgment, and cannot be affirmed in part and reversed in part, but must be reversed in whole, with directions to the court below to enter judgment for a correct amount.

That also seemed to be the law in New York, both prior and subsequent to the adoption of a code by that State.

Tillen v. *Kingston Mutual Ins. Co.*, 1 Seld. 406.
Parker v. *Van Houden*, 7 Wend. 145.
Smith v. *Jansen*, 8 John. 111.
Bradshaw v. *Callaghan*, *Ibid.* 558.
Flower v. *Allen*, 5 Cowen, 654, 668.
Van Bakkelin v. *Ingersoll*, 5 Wend. 341.

The reasons for the rule, in its practical application, are clearly illustrated in *Story* v. *The N. Y. & H. R. R. Co.*, 2 Selden, 89 (6 N. Y.), where a judgment was rendered for a specific sum, on account of certain work done under a contract, and another specific sum as damages for a breach of the same contract. In that case the judgment was affirmed as to the work done, but reversed as to damages assessed by reason of a breach of the contract.

The court, in *Story* v. *The N. Y. & H. R. R. Co.*, 6 N. Y. 89, said: "The first question is, whether the "Supreme Court had authority to affirm in part and reverse "in part the judgment of the Superior court.

"I see no objection to the exercise of such a power. "The present Supreme Court, in each district, has the "same powers and exercises the same jurisdiction as our "former Supreme Court. That court often exercised the "power of affirming in part and reversing in part a judg- "ment brought in review before it on writ of error, *where* "*such judgment was for distinct things.*" (*Smith* v. *Jan-*

" *sen,* 8 John. III; *Bradshaw* v. *Gallagher, Id.* 558;
" Anonymous, *Id.* 340; see, also, *Benson* v. *Mann,* 13 *Id.*
" 460; *Williams* v. *Sherman,* 15 *Id.* 195; *Dennison* v. *Col-*
" *lins,* 1 Cowen, 112; *Parker* v. *Van Houden,* 7 Wend,
" 147; *Sheldon* v. *Quinlen,* 5 Hill, 442, and note (a) 11.)

" The principle settled in these cases seems to be this:
" That *where a judgment is not entire,* but is for different
" things separable in their nature, and separated on the
" record, the Supreme Court, under its common law
" powers, may reverse in part and affirm in part. In the
" present case, the two grounds of recovery are in their
" nature distinct, and are in fact separated through the
" whole proceedings. The testimony, which shows the
" amount due for work done, has no bearing on the claim
" for damages for a breach of the contract, and *vice versa.*
" The referees considered the two subjects separately, and
" report a distinct amount for each. There is no contro-
" versy about one, while there is a serious question about
" the other. On the whole, I think this is a proper case for
" reversal in part and affirmance in part, provided the part
" reversed is erroneous."

This is the language of the judge writing the opinion, and seems to be in harmony with the rule laid down by other courts, although a majority of the court in that case were not of opinion that there could not be a reversal in part and an affirmance in part of the judgment at all.

But where the judgment is an entirety, and legal grounds exist for a reversal of a part, the whole must be reversed, and the cause sent back to the trial court, with instructions.

This rule I invoke here, and should no other cause for reversal be found to exist by this court, I ask that the

whole case be sent back to the Circuit Court and the judgment corrected there.

This court, in *Phillips, etc.*, v. *Seymour et al.*, 91 U. S. 646, reversed the cause because a certain specific sum was found by the jury which ought not to have been allowed. This ruling does not seem to be in harmony with the rulings of other courts, but it is not in conflict with the rule here invoked—that where the judgment is an entirety, this court cannot reverse in part and affirm in part.

Even applying the rule laid down in *Phillips* v. *Seymour et al.*, 91 U. S. 646, this case must be returned to the court below for a correction of the error.

IV.

The fourth ground of objection goes to the admission of evidence offered by the defendant in error, over the objection of plaintiff in error.

Upon the theory of the plaintiff below, that its measure of damages was the difference between the cost of manufacturing and delivering the rails in Chicago and the price to be paid for the same by the defendant, Hinckley, and in order to arrive at such cost, Mr. H. P. Smith, the only witness on that point, was asked to state the elements of cost in detail for rolling the rails. To this question objections were interposed, but the court below overruled the objection, and allowed the question to be answered. In order to answer the question, the witness produced a memorandum, in writing, made by some one else, as dictated by the witness from original entries in the books of defendant in error, previously abstracted by him in pencil. This memorandum, or extract, merely showed the items and cost of manufacturing a single ton of the rails, or a deduction arrived at by the witness from the entries in

the company's books, showing the gross cost of the entire material—of what it would cost to make a single ton. It is very clear that calculations had to be made from such entries taken in gross; and to allow the use of this memorandum or extract thus prepared, without giving the other side a chance to examine these books, for the purpose of a cross-examination and a personal inspection, to ascertain whether or not the witness might not have been in error as to this computation or method of reaching what he considered the cost of making a single ton of the rails, was to deprive the plaintiff in error of one of the most certain safeguards against a fraud being practiced upon him.

Further, this extract seems to have related to the manufacture of rails in August, 1882, when the cost of pig iron had depreciated about $3 per ton below the value of that article in March or April preceding, but figured out from records running through a series of months preceding.

Further, the court below not only permitted the witness to use this extract, which, he says, was written out by a book-keeper as he — the witness — called off items from a pencil memorandum which he had taken from the books of the Steel Company, but, against the objections of counsel for Mr. Hinckley, this loose memorandum was treated by the court as a piece of evidence. The court allowed the witness to read the items from the paper. This memorandum was the result of his conclusions from the examination of a large number of entries in certain books of his company, liable to be wrong in point of correctness in figuringl and also wrong in not being reached upon a correct or lega, basis or theory of ascertaining the cost of one ton from a mass of various materials bought to fill this large order, as well as other orders.

Nothing is plainer than that the original source of information ought to have been produced, that it might not only have been inspected, but that the witness might have been cross-examined and have demonstrated his results as correct in fact, and that his theory of arriving at his conclusions, as exhibited by this memorandum, was one approved by the courts.

I do not charge that any fraud was practiced on plaintiff in error by the use of this memorandum, but I submit that by its use not only a gross fraud could have been practiced upon him, but that he also might have been made the unwilling victim of an unintentional mistake.

By the methods used to reach the cost of manufacturing these rails at Pittsburgh the plaintiff in error was denied the usual precautions to avoid a wrong being perpetrated upon him, or an error innocently committed whereby he would have to suffer, and the practice is one that should not be tolerated. In a case of this kind, where a judgment has been rendered for the large sum of $42,400 as damages for a mere breach of a contract, the evidence ought to be convincing, and every rule governing the admission of evidence ought to be strictly enforced when invoked by the party against whom the damages are sought.

The original records of the company were in existence at the time of trial, and being the best evidence of the facts shown by them, their production, under the rules governing the admission of evidence, was proper and necessary when sought to be used by the plaintiff in making out its case.

It will be said that the only office this extract, or memorandum, performed was, to refresh the memory of the witness, who claimed to have bought all the material and knew the prices.

Conceding this to be true, we are entitled to know whether this memoranda correctly stated the facts. Mr. Smith either knew, independent of any record, what he paid for the raw materials which he had bought during that season, to fill the contract in question and other contracts, or else the prices had escaped his memory, and it became necessary for him to revive his recollection from some source where it was known to him to be correctly preserved. It is manifest that the latter alternative was true, because without the aid of this memoranda he was unable to state the items and their cost, and in using this extract several chances for error intervened. First, he may have made a mistake in taking his pencil notes from the books; second, the bookkeeper may have made a mistake in writing out the extract as dictated by the witness to him from the pencil notes; third, the books themselves might have disclosed errors if they had been produced; and fourth, which is much more material, the paper memoranda was the result of a computation of the cost of manufacturing one ton of rails, deduced from a book statement of the cost of a large amount of raw materials of various kinds bought in mass, to fill this and other orders during the spring and summer of 1882.

This point becomes material in the argument, because the court found from this very evidence that the cost to the plaintiff to manufacture and deliver the rails during that season would have been $50 per ton, when it was shown that during a part of the season it would have cost $55 per ton to have alone manufactured the goods in Chicago. The discrepancy being so great, raises a strong presumption, or suspicion, that Mr. Smith was in error, somewhere, regarding his estimate of cost in manufacturing and delivering the rails in question.

The point under discussion is elementary. It is unnecessary to cite authorities at length. The cases of *Taylor* v. *Riggs*, 1 Pet. 591, and *Dehane* v. *Moore*, 14 How. 253, announce the general principle involved.

There was another serious departure from the rules regarding the admission of evidence at the trial of this cause. Over the objection of plaintiff in error, the witness, Smith, was permitted to testify as to what took place between the company and Odell, the agent, who negotiated the sale to Hinckley, and relating to the same, notwithstanding the correspondence was in writing in the possession of Odell and the company, and no accounting for its absence, or foundation laid for the admission of secondary evidence.

It was part of the plaintiff's case to show that it was advised of Odell's actions in the premises, and that it ratified and approved them. In the progress of the trial it appeared that all communications between the company and Odell were by letters and telegrams in the possession and control of the company and its agent relating to this matter, yet the correspondence was not produced nor its absence accounted for, and oral evidence of the contents was admitted.

If this evidence was material in the case to enable the plaintiff to recover, it was due to the defendant that the best evidence of the facts should have been introduced at the trial. The same rule of evidence covering the other branch is applicable here.

In his opinion the court below cites, as applying to this case, the cases of *Masterton* v. *Mayor, etc.*, 7 Hill, 61; *U. S.* v. *Speed*, 8 Wall. 77, and *R. R. Co.* v. *Howard*, 13 How. 307. In those cases there was no market value for

the articles on which the labor and material were expended. Necessarily, the rule of damages as therein announced was the only one which could have been adopted in those cases. But an entirely different question presents itself when the manufacture of a commercial article, having a market value, is under consideration. The court did not treat the Steel Company as having any obligations to fulfill, except a literal compliance with the contract, and disregarded the rules of law laid down requiring contractors, under such circumstances, to use due diligence and to so act themselves as to inflict the least possible injury or damage upon those with whom they may have dealings, and whose condition may be such that a breach of contract would be unavoidable.

In *U. S.* v. *Speed*, this court considered "release from trouble, care, risk and responsibility attending a full execution of the contract," ground for making a "reasonable deduction;" but no deduction was made in this case.

Further, the court below attached undue importance to the matter of drilling for fish-plates. The cost of these coupling attachments was insignificant—only $130 per mile—and in building new road, the fish-plates, or coupling attachments, are procured to fit the rails as drilled, which cost $5,000 to the mile. This was shown in the letter from the company, of March 29th, and Hinckley's answer of April 1st. In those letters we learn, *first*, that manufacturers of steel rails keep rails in stock drilled, ready for use, and, *second*, that, so far as Hinckley was concerned, those stock rails, already drilled, would answer for his new track just as well as rails drilled upon any other standard. While the importance of the rails being drilled in some peculiar way was apparently magnified in the

mind of the court below, still, in his findings, the learned judge did not find that it was *necessary* for the company to have drilling directions, but "*that it was usual and* "*customary for the customer of steel rails to give directions* "*as to the drilling thereof, and that each railroad com-* "*pany has its own special rules for drilling*," which illustrates what I have before said, that it is wholly a matter of taste, or caprice, and that there can be no superior merit in one style of drilling over another.

I have contended that the court below, upon his own theory of damages, ought to have mitigated the damages, because of the risk, etc., which the company escaped in not making the rails, a rule which this court applied in *U. S.* v. *Speed, supra*, and in this case another element ought to have been considered in mitigation of damages, to wit: interest on the capital invested in the company's "plant." On the theory of "profits" in a manufacturing business, interest on capital invested is a very proper item of deduction in order to arrive at the true net gains. This element could not have entered into the case of *U. S.* v. *Speed*, because no "plant," or invested capital, was involved, as in this case.

One more consideration. The company accounted for 4,000 tons of rails made out of material bought for the Hinckley contract, but did not account for the other 2,000 tons. It is a fair presumption that it lost nothing on these 2,000 tons, and it should have shown a loss, in order to recover, on the theory of the trial court.

In the case at bar there is nothing to indicate unwillingness on Mr. Hinckley's part to accept the rails. It was simply inability. If it was permitted to look into the record further than to apply what is therein contained to the special findings of the court, and the law governing the

several questions raised, this court could satisfy itself that the plaintiff in error was led into the belief that the company's mill was in active operation during that season, and that his inability to carry out the contract would not operate to inflict any serious loss upon the defendant in error; and I believe that upon a careful accounting it can be demonstrated that less than one quarter of the amount of the judgment rendered in this case will fully compensate it for any possible loss it may have sustained arising from any breach of the contract on the part of Hinckley. If so, and the Steel Company can be "*made whole*" by the payment of a very much less sum than $42,400, equal justice demands that such a result should be brought about, if possible.

If this judgment shall stand and eventually paid, it will be a severe punishment upon plaintiff in error for his misfortune in not being able to carry out his contract.

Of course, a reversal of that judgment by this court must be on the ground of some error of the court below, of which this court has cognizance.

I submit that such error was committed.

THOMAS S. McCLELLAND,
Counsel for Plaintiff in Error.

121-264

Office Supreme Court U. S.
FILED
MAR 7 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

FRANCIS E. HINCKLEY,
Plaintiff in Error,
vs.
THE PITTSBURGH BESSEMER STEEL COMPANY (LIMITED),
Defendant in Error.

Error to the Circuit Court of the United States, for Northern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

JNO. N. JEWETT,
ATTORNEY AND OF COUNSEL FOR DEFENDANT IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

FRANCIS E. HINCKLEY,
Plaintiff in Error,
vs.
THE PITTSBURGH BESSEMER STEEL COMPANY (LIMITED),
Defendant in Error.

Error to the Circuit Court of the United States, for Northern District of Illinois.

STATEMENT.

The declaration in this case consists of two special counts and the common counts in assumpsit. The action is based upon a written contract between the parties, set out, in the first count, according to its tenor and effect, and, in the second count, *in hæc verba*, dated February 18, 1882. No objections have been taken to the form or substance of the declaration, and the only plea is the *general issue.* The defendant in error was plaintiff in the trial court, and recovered judgment for the sum of $42,400 damages and costs of suit, and it is from that judgment that the pending writ of error is prosecuted.

The case was submitted to and tried by the presiding

judge of the court below, without the intervention of a jury. The *opinion* of the learned judge, his *special findings* of facts, and the *bill of exceptions* are contained in the record. The defendant in error makes no complaint of the theory adopted by the learned judge in the court below in the assessment of damages; but, adopting that theory, is obliged to admit that the learned judge made a mistake in the result, as shown in his opinion on page 12 of the printed record. It is a mere mistake in figuring, by which the judgment is made $800 more than it should be. He evidently intended to render a judgment for the difference between $48,000 and $6,400, which should have been $41,600 instead of $42,400. For this difference of $800, so clearly appearing as a mistake in subtraction, the defendant in error has entered a *remittitur*. This arithmetical error in nowise affects the merits of the case on the part of the defendant in error, except as to the amount so remitted.

The contract sued on bears date February 18, 1882, and was for the *manufacture, sale and delivery*, by the defendant in error to Hinckley, the plaintiff in error (who agreed to purchase and pay for the same), of "6,000 "gross tons of first quality steel rails, to weigh fifty-two "(52) pounds to the yard." * * *

"Said rails are to be made of the best quality of Bes- "semer, and to be subject to inspection as made and "shipped, and to be well straightened and free from "flaws, and *to be drilled as may be directed.* * * *

"Deliveries to begin in May, 1882, in which month "one thousand tons shall be delivered, and to continue at "the rate of twenty-five hundred tons per month after "July 1, 1882, until finished," strikes and accidents, etc., excepted.

The price and terms of payment were $58 per ton of 2,240 pounds of *finished* steel rails, discharged from ship or *free on board cars* at Chicago. Payment to be cash, on delivery of inspector's certificate for each 500 tons, as fast as delivered, and if delivery was delayed *without fault of steel company*, payment to be made in cash upon completion and delivery of each 500 tons at Chicago and inspector's certificate. (Rec., 5.) There was a provision in the contract (Rec., 6) that, upon giving thirty days' notice, the plaintiff in error should have the right to make one-half of the order fifty-six (56) pounds per yard, pattern No. 4 of the steel company; but no such notice was ever given.

The claim of the defendant in error is, that it made all necessary arrangements for the execution of this contract, and was, at all times, ready, able and willing to fulfill and execute the same on its part; that it was induced by the representations of the plaintiff in error, and by his failure to furnish drilling directions, etc., to delay its execution until the time mentioned in the contract for its execution had elapsed, when the plaintiff in error absolutely refused to receive or pay for the rails, or to give any directions in respect to them, alleging, in substance, that he had made a much more favorable arrangement for the purchase of steel rails than his contract with defendant in error provided for. (Rec., 20.)

The proof shows that steel rails declined in price from the date of the contract to September of the same year. That the capacity of the mills of defendant in error was equal to the production of the 6,000 tons of rails within a period of three or four weeks, and that those mills were idle for want of work for three weeks in the summer of

1882, and within the time limited in the contract for its performance.

The statement of facts, which prefaces the brief and argument of counsel for plaintiff in error, on its face, is simply an abstract of the several matters offered in evidence on the trial. I wish to supplement it with a few suggestions:

1. The contract sued upon was entered into by Hinckley with a *manufacturer* and not with a *merchant.*

2. The steel rails contracted for, were not manufactured when the contract was made, and the contract involved the necessity of manufacturing the rails contracted for and of making preparation for so doing.

3. The rolling-mill and other facilities for the manufacture of steel rails, was a permanent investment of the defendant in error. Interest and other expenses on that plant were continuous, whether the mill was in operation or not.

4. Hinckley persistently postponed the execution of the contract under various pretenses (whether true or not is immaterial) and *induced* the defendant in error, as a matter of accommodation to him, to delay the making of the rails until the time for the performance of the contract, as expressed upon the face of it, had expired; and then *absolutely refused* to give any directions as to the manufacture of the rails, and "declined to take any rails "whatever under the contract," alleging "that he had "made other arrangements for the rails at a good deal "better figures," etc. (Testimony of Mr. Norton, Rec., 20.)

5. During the entire time whilst the contract was pending, Hinckley refused or neglected to give drilling

directions, as he had reserved the right to do by the contract, without which the rails could not be completed as required by the contract. The testimony of Jones, Moore, Draper and Jordan (Rec. 26, 27) is conclusive that drilling is part of the manufacture of rails, and that drilling directions were necessary to enable the manufacturer to fill the contract.

6. The price of manufactured rails, as well as the price of materials, constantly declined from the date of the contract down to the time (September 15, 1882) when Hinckley absolutely refused to give any directions or to receive the rails.

7. Until the final refusal, Hinckley was simply applying for delay and a modification of the terms of purchase. *The delay* was at his instance and for his accommodation. His request for *modification* of the terms of purchase was refused. (Rec., 19 and 20.)

The foregoing suggestions, deduced from the bill of exceptions in the case, are in harmony with the "special "findings" of the learned judge, before whom the case was tried, and represent the facts important to the determination of the legal questions involved.

ARGUMENT.

I see little occasion for an extended review of the lengthy argument of the learned counsel for the plaintiff in error. The whole testimony in the case, *if the court will consider it apart from the "special findings,"* justifies those "findings," in this respect, at least, that the defendant in error was, at all times, ready, able and willing to execute its part of the contract, explicitly and according to its exact terms and provisions. The substance of the argument for Mr. Hinckley is that the defendant in error *should have disregarded* his requests and failures, and manufactured the rails for general commercial purposes (which was entirely outside of its business), tendered them to him and then sold them in the market for Hinckley's account, charging him with the difference between the contract price and the price realized.

Without any special reference to authorities, it may be admitted that, if A contracts to purchase of B as a merchant, a certain specified lot of goods, to be delivered at a specified time, at a fixed price, and fails to take and pay for them as specified in the contract, the difference between the contract price and the market price, at the time delivery was to be made, is the measure of A's damages, in a suit brought by him against B for breach of the contract, and this is, absolutely, without reference to the fact whether A, upon B's refusal to take the goods, had sold them in the general market or not. The present case is not of that

kind, and the results of it, therefore, do not depend upon the rule deducible from such conditions. For the right application of the rules of law to the present case, in a general way, I much doubt if I can do better than to refer the court to the opinion of the learned judge before whom the case was tried, contained in and made a part of the record of the case, excepting, of course, the mere mistake of arithmetic, apparent on the face of the opinion, which has been cured by a *remittitur* entered in the Circuit court. To that opinion I wish to add the following suggestions by way of supplement.

I.

The contract made by Hinckley was with the Pittsburg Bessemer Steel Company, as a manufacturer; and, whilst it is true, that the terms for delivery were specified in the contract, the time for the performance of a contract is not of its essence, unless expressly made so by the contract itself, and therefore may be varied or modified, at the pleasure of the parties. Hinckley, *by his own acts*, excused and prevented the execution of the contract by the steel company, or induced the company, *for his own accommodation*, to delay its execution according to its express terms. The consequences of such delay, therefore, must be charged against him alone.

II.

The drilling directions were necessary to enable the company to complete the rails as the contract provided.

The clause of the contract here pertinent (Rec., 14) is, "said rails to be made of the best quality of Bessemer "steel, and to be subject to inspection as made and "shipped, and to be well straightened and free from flaws, "*and to be drilled, as may be directed.*" DIRECTED BY WHOM? The court must answer the question. *It appears* that Hinckley not only did not give drilling directions, but that upon repeated requests for them he delayed and postponed the giving of them, and finally refused to do so, as well as refused *absolutely* to execute the contract on his part, the reason assigned being, in substance, that he had made other and better arrangements for the rails. The only inference deducible from these facts is, that Hinckley preferred to take the chances of an action at law for violation of his contract to the fulfillment of it on his part.

If the court will go behind the "*special findings*" to determine the facts upon which those "*special findings*" are predicated, I would call attention to the letter of the agent of the steel company of March 29, 1882, and Mr. Hinckley's answer thereto of April 1st (Rec., 15, 16). The agent's letter says that the company has on hand 1,200 tons of fifty-two pound rails, drilled in a particular way, and then says: "We may wish to turn these rails "in on your May delivery; if so, will this delivery suit "you?" The answer is: "Yours of the 29th is received, "*and I have carefully* considered the contents. The first "thousand tons of rails that we are to receive under our

"contract are for repairs of old track, *and it will be nec-*
"*essary to have them punched to fit our present plates.* If
"it was for new track, independent, the punching which
"you name would make no difference; *sorry not to be able*
"*to accommodate you, but do not see how I can well do it.*"

I refer to this as showing that Hinckley understood, that by the terms of the contract he had *reserved to himself* the right of directing how the rails should be drilled, and that he *would not be obliged* to accept, under the contract, any rails unless they had been drilled *as directed by him*. There is nothing in the contract distinguishing the first 1,000 tons from the remaining 5,000, either as to drilling or inspection. Mr. Jordan, engineer of the Chicago, Burlington and Quincy Railroad Company (Rec., 27), says: "It was usual with his company to give direc-
"tions for drilling before the rails were rolled. *A rail is*
"*not now considered finished until it is drilled. It is part*
"*of the manufacturer's business to drill the rails.*" The testimony of the other witnesses, already referred to, all practical railroad men and called as witnesses by Mr. Hinckley, substantially concurs in this statement.

It is admitted by counsel, that the correspondence and testimony excused the steel company from manufacturing and delivering the 1,000 tons of rails in May, and that Hinckley is responsible for the loss on that part of the order. Simply as a question of fact, does Hinckley stand in any better position respecting the remaining 5,000 tons?

The record shows the correspondence between the parties (pages 15 to 21), but I especially call attention to the letter of Mr. Smith, the business manager of the steel company, to Mr. Hinckley, of date of June 23, 1882 (page 19), as follows:

"Kindly note that we are ready to commence rolling "on our contract with you for July deliveries, also to "cover 1,000 tons specified for May, which we are (were) "prepared to roll and deliver in that month, but which "you asked us to postpone.

"As we paid high figures for the material to make "these rails, and *have no work for our mill in place of it*, "we must respectfully ask you to furnish patterns and "specifications, as provided in the contract, *without fur-"ther delay*, and trust you may be in shape to do so."

To this letter there would seem to have been no reply; for, on the 30th of August, Mr. Smith, in writing to Mr. Hinckley (Rec., 20), says: "*We have been anxiously "waiting some reply from you to our respects of June 23d*, "and would remind you that the time for the completion "of your contract with us has expired. We shall be "pleased to know at once whether you expect to take the "rails or not," etc.

The remainder of the letter invites an interview with Mr. Hinckley, at Pittsburg, and in his reply, under date of September 1, Mr. Hinckley (Rec., 20), taking no note of the request for information as to the furnishing of the rails, simply suggests that he cannot go to Pittsburg at present, and that it might be convenient for Mr. Smith (perhaps?) to meet him in New York at some future time.

This is so characteristic of the shuffling and procrastinating disposition of the man, as illustrated throughout this whole transaction, that I have ventured to refer to it more specifically, perhaps, than was necessary. Two weeks later, Mr. Hinckley, when directly applied to by Mr. Norton, as the representative of the steel company,

said "that he declined to take any rails whatever under "the contract; that he had made other arrangements at a "good deal better figures." (Rec., 20.)

It was upon this testimony, and much more of the same character, that the learned judge of the court below based his "special findings," and I submit that he was fully justified therein in respect to this part of the case.

III.

The performance of the contract on the part of the steel company had been deferred, at Hinckley's persistent request, when he was fully advised that such delay would leave the mills of the steel company without work. I am not aware of any rule of law which would visit the consequences of such a delay upon the steel company, or which would require the company to manufacture the rails *in disregard* of the request of Mr. Hinckley and place them upon the market for sale for his account and protection.

Mr. Hinckley finally refused, absolutely, to take any rails under the contract, and the damages awarded against him, were less than the amount of the profits which would have been realized by the steel company from its execution.

Under this general statement I will consider the several propositions of the counsel for Mr. Hinckley so far as they seem to require a reply.

IV.

Counsel claims that the giving of drilling directions was *not* a condition precedent to the performance of the contract by the steel company.

The entire correspondence between the parties is a refutation of this proposition, as a *matter of fact*, even if that question is not settled by the findings of the Circuit court. The cases cited from 18th Illinois Reports do not apply here. Cases do not take the place of facts.

The supplement to this proposition, viz: that Hinckley waived his right to give such directions, as to delivering for July and August, by his letter of April 1, 1882 (Rec., 16), is equally untenable. That letter relates only to the 1,000 tons for May delivery, and the subsequent correspondence contains no intimation of such waiver.

V.

The second point in the brief of counsel for Hinckley is, that the damages assessed against Hinckley for violation of his contract, should have been the difference between the contract price and the market price of the rails at the time and place of delivery, instead of the difference between the contract price and the cost of the rails to the steel company, and under this heading there are several subdivisions.

The main proposition, and this may be said to include all its subordinate parts, involves this absurdity, viz.: That after Hinckley had, for his own accommodation, *persuaded*

the steel company to delay the execution of the contract, until the time for its performance had expired and then *absolutely refused* to receive any rails under the contract, the steel company should have manufactured 6,000 tons of steel rails in some hap-hazard manner, and put them upon the market and sold them for Hinckley's account in order to determine how much Hinckley should pay. I am not aware of any decision of a court, and none has been cited, covering such a proposition. The converse of it might be better put, viz.: Hinckley induced the steel company to delay the execution of the contract and *finally refused* to perform it on his part. This request and refusal excused the steel company from performance on their part, although the company had made early and full preparation for its performance, and was, at all times, ready to fulfill it. During all of this delay steel rails and the materials entering into their cost were constantly declining in market value. Hinckley knew this, or was bound to know it, and his excuse for repudiating his contract is evidence of the fact that he did know it. At no time until the 15th of September, 1882, did he say to the steel company that he would not perform the contract on his part. Up to that time he was simply pleading for delay, and, *at his request*, the delay was granted. Why should not Hinckley have said to the steel company, as matter of protection to his own interests: "Make the rails and "I will take them and pay for them as provided in the con- "tract, and if I cannot use them I will sell them, and thus, so "far as I can, protect myself against loss under the con- "tract." The court cannot constitute the steel company the guardian of Mr. Hinckley's interests outside of its contract and its business as a *manufacturer* of steel rails. The steel company was manufacturing rails *as ordered*

and contracted for and *for the profits resulting from the filling of such orders and contracts as a manufacturer*, and not as an agent or broker for Mr. Hinckley or any other of its customers.

The Circuit court allowed to Mr. Hinckley, as an offset, every item in mitigation of damages, which upon the proof he could claim, under the principles controlling in such cases as stated in several authorities cited by his counsel. The opinion of the Circuit judge and the special findings show, that the steel company manufactured, pending the Hinckley contract, and under a contract obtained in the meantime, 4,000 tons of thirty-five-pound rails for a railroad in Michigan, at a profit per ton of one dollar and sixty cents, or gross profit of $6,400, and this profit of $6,400 was deducted from the damages under the Hinckley contract. No exception has been taken to this deduction, although it would seem to be unfair, for the reason, that it does not appear that the filling of the Michigan order *in any way interfered with the ability of the steel company* to manufacture and deliver the Hinckley rails; and it does *affirmatively* appear that the mills of the steel company were idle for want of business, in the summer of 1882, for three months—a time fully sufficient to have produced the 6,000 tons contracted for by Hinckley. By that allowance, Mr. Hinckley certainly received the benefit of all the profits made by the steel company which could be possibly regarded as a substitute for the profits under *his contract*. The steel company did not stop its mill, because of the postponement of the Hinckley contract, so long as it had or could find work to do. This would seem to dispose of the several analogies which counsel seeks to make application of—such as the instance of a mechanic or laborer employed at fixed wages for a

specified time, and whose services the employer refused to accept, in support of which reference is made to cases in 21st and 22d Wendell and 28th N. Y. In all such cases, it is admitted, that the workman or contractor cannot sit down *listlessly* on his contract of employment and at the end, claim his full compensation. The courts do not encourage idleness by allowing to it full compensation, unless the idleness is the *necessary* consequence of a violated contract. The record is *an acquittance* of the defendant in error in that respect, and the opinion and "special findings" of the Circuit judge are in harmony with this conclusion.

VI.

If an answer to the *third* proposition of the counsel for Mr. Hinckley is required, it is found, as to the first part of it, in the contract on which the present action is based, which says (Rec., 5): "If shipment is delayed, *without* "*fault of said steel company*, payment is to be made in "cash upon completion and delivery of each five hundred "tons at Chicago, and inspector's certificate. Rails to "be *inspected* at mill as fast as completed and ready for "shipment."

The testimony is, and so the Circuit judge found, that immediately upon the signing of the Hinckley contract, the steel company provided the means for its performance on its part, and was at all times able, ready and willing to execute it. And as between the parties, I submit that it was *no fault* of the steel company, in any legal or equitable aspect of the case, that it delayed the execution of the contract, *at Hinckley's request.* A request for delay, acquiesced in, becomes a contract for delay. Good faith

and honesty are involved in this proposition, and there is no principle of law applicable to this case, which ignores these vital elements of conventional rights. Everything, except the preparation for the performance of the Hinckley contract, was delayed by the steel company at Hinckley's request, and for his accommodation, until, after the expiration of the time limited in the contract for its performance, when he absolutely refused to perform on his part. This statement epitomizes the facts which constitute the basis of the claim of the steel company in this case.

The second part of the learned counsel's *third* proposition is answered by the supplemental record.

As already stated, a mistake, apparent, as to amount, on the face of the record, was made by the trial judge—a mere error of subtraction—by which the finding and judgment, upon the theory of his decision, were for $800 more than they should have been. Under the decision of this court, in the case of *The Bank of Kentucky* v. *Ashley et al.*, 2d Peters, 327, a *remittitur*, covering this evident mistake, could have been entered in this court; but, following the decision of the court in the case of the *Phillips and Colby Construction Co.* v. *Seymour et al.*, 1 Otto, 646, it was deemed advisable to correct the evident mistake, definite as to amount and apparent on the face of the record, by a *remittitur* entered in advance in the court below. This the supplemental record shows, and it is submitted that the mistake is thereby cured.

VII.

But it is argued that the Circuit judge permitted an improper use of a memorandum, produced by Mr. H. P. Smith whilst on the stand as a witness, relating to the cost to the steel company of manufacturing Bessemer steel rails. The testimony of the witness in connection with the memorandum appears upon pages 23 and 24 of the record.

It is admitted, that there are certain technical rules of evidence relating to the use of memoranda by a witness; but they do not apply here. When a witness is testifying to a fact or a conversation, his memory must be exhausted before resort can be had to his memoranda, which must then have been made by himself at or about the time of the occurrence, and referred to only as a means of refreshing his recollection; but it has never yet been held that a witness' memory was expected to be an entablature of mathematics or figures, or of market reports. In all such matters, the best a man can do in respect to the past, is to compile the information gathered and preserved in the course of his experience and present the result as matter of evidence. To exact more would be like asking a witness to tell the amount due upon a promissory note without allowing him the use of paper and pencil to make the calculation. The technical law relating to the use of memoranda does not apply to such a case.

But there is another and possibly a more satisfactory answer to this proposition of Mr. Hinckley's counsel, and that is, that the learned judge did not adopt or follow the testimony (memorandum included) of Mr. Smith.

In his opinion (Rec., 11) the judge says: "The proof "as to the cost of those rails to plaintiffs, rests on the tes- "mony of two witnesses, H. P. Smith, the manager of "plaintiffs' mill, and Richard C. Hanna, secretary of the "North Chicago Rolling-Mill Company." And then, after stating what those two witnesses respectively say upon that subject, the opinion proceeds as follows: "Mr. "Hanna has no interest in the event of this suit, is not "connected with either party, and I conclude that his tes- "timony as to the cost of those rails here, is the most "reliable, and that it would, in fact, have cost the plaintiff "$50 per ton to have made those rails and delivered them "to the defendant in accordance with the terms of this "contract."

This clearly shows, that the testimony of Mr. Smith, memorandum and all, was set aside by the court in favor of the wholly disinterested testimony of Mr. Hanna. The memorandum, therefore, whether properly used or not, had no influence in determining the result of the case.

VIII.

In fixing the measure of damages to be paid by Hinckley to the steel company, resulting from the breach of his contract, the learned judge at the circuit, followed the rule laid down by this court under similar circumstances in the cases of

Philadelphia W. & B. R. Co. v. *Howard*, 13 Howard, 307.
United States v. *Speed*, 8 Wall., 77.

And it is respectfully submitted that in doing so he committed no error, except the one of subtraction, which

has been corrected by the *remittitur*. The rule, of course, needs no support from other authority for the purposes of this court; but it is the same rule laid down in *Masterton* v. *The Mayor, &c., of Brooklyn*, 7 Hill, 61, referred to with approval in the case in 8 Wallace and in 1 Sutherland on Dam., page 117, and numerous authorities there cited, all of which are noted in the opinion of the learned judge. (Rec., 12 and 13.) It would seem that these references should be conclusive of the present case, and render unnecessary any further discussion of the law; and, in conclusion, I submit, that, unless the breach of a contract carries with it no pecuniary consequences against the party guilty of the breach, the judgment of the Circuit court in this case must be affirmed.

JNO. N. JEWETT,
Atty. and of Counsel for Defendant in Error.